Petition

81-1440

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ALEXANDER L. STEVAS,
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Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

JAMES A. RHODES, et al.,

Petitioners,

vs.

RONALD E. STEWART, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD AN AWARD OF ATTORNEYS' FEES MADE PURSUANT TO 42 U.S.C. SECTION 1988 BE UPHELD WHERE THE FAIR MARKET VALUE OF THE ATTORNEYS' SERVICES WAS NOT ESTABLISHED; WHERE PAYMENT FOR AN UNREASONABLE AMOUNT OF TIME WAS ORDERED; WHERE THE REQUEST WAS NOT SUPPORTED BY ACCURATE AND CONTEMPORANEIOUS RECORDS; WHERE NO DEDUCTION WAS MADE FOR DUPLICATION OF SERVICES; AND WHERE THE AWARD IS BASED ON SUBJECTIVE AND UNREVIEWABLE CRITERIA.

PARTIES

The petitioners in this action are James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Ohio Department of Rehabilitation and Correction, E. Blaine Haskins, Deputy Director of the Ohio Department of Rehabilitation and Correction, David R. McKeen, Chief of the Division of Institutions of the Ohio Department of Rehabilitation and Correction and former Superintendent of the Columbus Correctional Facility. The respondents are Ronald E. Stewart, Roy Martin, and James Bolden, the named plaintiffs in the courts below for a class of all inmates of the Columbus Correctional Facility, and Pearly Wilson.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Stewart v. Rhodes*, 656 F. 2d 1216 (6th Cir. 1981). (A 2). The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported. (A 20).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered August 12, 1981. A petition for rehearing and suggestion of rehearing en banc was denied on September 29, 1981. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. Section 1988:

Proceedings in vindication of civil rights

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil

Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case was initiated in the United States District Court for the Southern District of Ohio, Eastern Division on March 9, 1978 by the filing of a complaint pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(e). The case was assigned number C-2-78-220. The eighteen (18) page complaint raised forty-one(41) separate and distinct claims of constitutional violations grouped into eight(8) causes of action. The plaintiffs sought injunctive relief and damages of approximately $34,000.00 per day. The plaintiff class was certified on September 5, 1978.

The plaintiff class was represented by lawyers employed by the American Civil Liberties Union of Ohio Foundation, Inc. ("ACLU") and the Ohio State Legal Services Association ("OSLSA"). Due to a change in employment of one of plaintiffs' counsel, the Legal Aid Society of Columbus, Ohio ("Legal Aid") also represented the class. The United States Department of Justice, on plaintiff's motion, was permitted to intervene as *amicus curiae* with all the rights of a party on October 3, 1978. The Justice Department was granted exclusive rights in the area of discovery. On October 10, 1978, the case of *Wilson v. Denton*, no. C-2-76-741, was consolidated with with the instant case. Wilson was represented by the firm of Alexander, Ebinger, Fisher, McAlister & Lawrence. The plaintiffs also enjoyed the services of faculty and students of the Ohio State University College of Law("OSU").

On December 4, 1979, the plaintiffs' claims were settled, without a trial, by the filing of a consent decree. Applications for attorneys' fees were filed on December 12, 1979.

Alexander, Ebinger, Fisher, McAlister & Lawrence requested fees and expenses of $49,435.37. The request was premised on the fact that two lawyers, Alven McKenna

and D. Michael Miller, and several clerks had worked 699 hours on the case. Mr. McKenna's time was billed at $75.00 per hour in 1978 and $85.00 per hour in 1979. Mr. Miller's time was billed at $65.00 per hour in 1978 and $75.00 per hour in 1979. Clerks' time was billed at $20.00, $25.00 and $30.00 per hour. The hourly rate was the usual rate paid by the firm's clients. The fee request was based on accurate and contemporaneous time records.

Jean Kamp, an employee of the ACLU, requested fees and expenses in the amount of $75,680.84 alleging that she, another lawyer employed by the ACLU, and various paralegals had worked a total of 991 hours on the case. The request was not supported by accurate and contemporaneous records. (A5, A7 - A10). The hourly rate was arrived at by adding $5.00 per hour to the rate requested by Mr. McKenna (A48); i.e. $80.00 per hour during 1978 and $90.00 per hour during 1979. Paralegals' time was billed at $25.00 and $30.00 per hour, although Mrs. Kamp was not sure what the paralegals were paid or if they were paid by the ACLU. (A47).

Clement Pyles, an employee of OSLSA and Legal Aid, requested fees of $19,830.00 for 324 1/4 hours alleged to have been expended by himself and clerks. Mr. Pyles claimed his services were worth $70.00 per hour in 1978 and $80.00 per hour in 1979. The clerks' time was billed at $30.00 per hour. Mr. Pyles arrived at his hourly rate by deducting $10.00 per hour from the rate asked by Mrs. Kamp. (A48 - A49).

No fees were requested by the Justice Department or OSU.

Following a July 3, 1980 hearing the district court, on September 3, 1980, entered its judgement (A20) based on its memorandum and order of July 25, 1980. (A28). The district court found that the ACLU was entitled to fees of $65,325.84; that Alexander, Ebinger, Fisher,

McAlister & Lawrence had earned $32,598.50; that Legal Aid had provided $16,464.00 worth of services; and that $2,632.00 was due OSLSA. The $117,020.34 award was based on an assumption that approximately 1,850 hours were expended in nineteen months on a case that was not tried; a case in which the Justice Department had exclusive control of discovery; and where much of the work was done by students and faculty of OSU.

Following the district court's denial of defendants' motion for a stay, the plaintiffs were ordered to post a bond in the amount of $67,074.04 and the defendants paid the award of attorneys' fees.

On October 2, 1980, the defendants filed a notice of appeal. The United States Court of Appeals for the Sixth Circuit assigned the case number 80–3662. Following briefing, oral arguments were made on June 17, 1981. (Two days after this Court had reversed the Sixth Circuit decision in *Rhodes v. Chapman*, ____U.S.____, 69 L. Ed. 2d 59 (1981), a case involving many of the same parties and counsel). The decision of the district court was upheld by a 2-1 decision filed August 12, 1981. *Stewart v. Rhodes*, 656 F. 2d 1216 (6th Cir. 1981). (A2). A petition for rehearing and a request for rehearing en banc, filed August 24, 1981, was denied on September 29, 1981. This petition has followed.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

In passing 42 U.S.C. Section 1988 it was clearly the intent of Congress to provide for the payment of *reasonable* attorneys' fees to the prevailing party in a suit filed pursuant to 42 U.S.C. Section 1983. It was also the intent of Congress to utilize the standards set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), to determine the reasonableness of an award of attorneys' fees. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). The standards set forth in *Johnson*, at 717-719, are:

1. The time and labor required. . .

2. The novelty and difficulty of the question. . .

3. The skill requisite to perform the legal service properly. . .

4. The preclusion of other employment by the attorney due to the acceptance of the case. . .

5. The customary fee. . .

6. Whether the fee is fixed or contingent. . .

7. Time limitations imposed by the client or the circumstances. . .

8. The amount involved and the results obtained. . .

9. The experience, reputation, and ability of the attorneys. . .

10. The "undesirability" of the case. . .

11. The nature and length of the professional relationship with the client. . .

12. Awards in similar cases. . .

The *Johnson* standards have been applied in a multitude of attorneys' fees cases and have been substantially adopted, as was the intent of Congress, by every federal appellate court in cases involving 42 U.S.C. Section 1988. *Anderson v. Morris*, 658 F. 2d 246, 248 (4th Cir. 1981); *Staten v. Housing Authority of the City of Pittsburgh*, 638 F. 2d 599, 605 (3rd Cir. 1980); *Northcross v. Board of Education of Memphis City Schools*, 611 F. 2d 624, 642-643 (6th Cir. 1979); *cert. denied*, 447 U.S. 911 (1980); *Furtado v. Bishop*, 604 F. 2d 80, 98 (1st Cir. 1979); *cert. denied*, 444 U.S. 1035 (1980); *Hampton v. Hanrahan*, 600 F. 2d 600, 643 (7th Cir. 1979); *rev'd on other grounds*, 446 U.S. 754 (1980); *Francia v. White*, 594 F. 2d 778, 782 (10th Cir. 1979); *Brown v. Bathke*, 588 F. 2d 634, 638 (8th Cir. 1978); *Prate v. Freeman*, 583 F. 2d 42, 48 (2nd Cir. 1978); *Fountila v. Carter*, 571 F. 2d 487, 496 (9th Cir. 1978); *Rainey v. Jackson State College*, 551 F. 2d 672, 676 (5th Cir. 1977).

While this Court has never specifically dealt with any set of standards or criteria for determining the reasonableness of attorneys' fees, it has upheld the "lodestar" approach in making such determinations. This Court stated in *Delta Air Lines, Inc. v. August*, ____U.S.____, 67 L. Ed. 2d 287, 300 (1981); "The primary factors relevant to setting the fee usually are the time expended and

a reasonable hourly rate for that time." See also 15 U.S.C. Section 2059(e)(4).

The word "reasonable" remains undefined. Fee award calculations are subjective, evade review of appellate courts and are of little or no precedential value to other courts in deciding similar cases. The chaotic state of the law is illustrated by the 685 percent difference in fees allowed in similar cases. Dopke, "Calculations of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976", John Marshall L.R. Vol. 13, p. 378 n. 234 (1980).

The logical starting place in determining a reasonable fee is the fair market value of the service provided. The United States Court of Appeals for the Sixth Circuit held in *Northcross, supra* at 638:

> We have indicated in serveral opinions that it is desirable, whenever possible, *to vary the hourly rate awarded depending upon the type of service being provided*. Again turning to our mandate to award fees "*As is traditional with attorneys compensated by a fee-paying client*" a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee.
>
> In determining what the level of compensation for each category of service should be, the court should look to the *fair market value* of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney

> for his or her services will normally reflect the training, background, experience and skill of the individual attorney. *For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance.*
>
> *Focussing* (sic) *on the fair market value of the attorneys's services will best fulfill the purposes of the Act*, by providing adequate compensation to attract qualified and competent attorneys *without affording any windfall* to those who undertake such representation. The entire purpose of the statutes was to ensure that the representation of important national concerns would not depend upon the charitable instincts of a few generous attorneys. (Emphasis added)

The decision in the present case is not only contrary to the clear intent of Congress and the decisions of other federal appellate courts, but demonstrates that the court below ignored its prior decisions. No decision better illustrates the chaotic state of the law, than the decision below.

Following an erroneous summary of the facts underlying the fee claim (A2; cf. Statement of the Case, p.4, and A31, A33), the appellate court held that the district court's decision correctly applied the factors established in *Northcross*. The district court, and plaintiffs' counsel, made no attempt to ascertain the fair market value of the services rendered. The ACLU, OSLSA and Legal Aid arrived at their hourly rate simply by adding to the fees usually charged by Messrs. McKenna and Miller to their corporate clients. (A48, A49). The hourly rate approved by the district court and the appellate court is approximately twice the fair market value of the services rendered. (A14 - A15).

The fee awarded Mrs. Kamp is also twice that awarded by the same district judge for work done at the same time in a similar case to Mrs. Kamp's supervisor (A15). There is simply no reason why Mrs. Kamp was worth $40.00 an hour more than her more experienced supervisor; nor was there any reason to pay lawyers employed by public interest groups on a par with partners in large law firms.

The fact that the district judge mentioned a controlling case, *Northcross, supra*, does not necessarily mean he followed the decision. As Judge Weick stated, in dissent, the record presented on appeal was inadequate. The *Northcross* decision was not followed. The district court's decision does not explain how the hourly rate was determined. The decision should have been remanded for a proper analysis. See *Davis v. Fletcher*, 598 F. 2d 469 (5th Cir. 1979).

The court below also failed to properly analyze the appropriate number of hours spent litigating this matter and how those hours were spent. It must be remembered that the lawyers awarded fees were assisted, free of charge, by professors, law students and the Justice Department.[1] If the time spent by OSU faculty and students and Justice Department employees were to be counted, the hours spent on this case in nineteen months may well have exceeded the 4,839 hours spent litigating *Northcross, supra*, over a period of nineteen years.

Some of the hours spent litigating this case can be explained by the amount of duplication found by the district court. The fee request of the private practitioners was

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[1] The Justice Department was so deeply involved in this case that less than two months before trial, Mrs. Kamp (who claimed to be lead counsel) was unaware of the identity of the expert witnesses to be called by the plaintiffs. (A 51).

pared by 30 percent because of duplication. (A37). It should be noted that while the district court assumed that Messrs. McKenna and Miller had profited from the participation of the Justice Department and OSU, no deduction was made from the fees awarded the public interest groups for the obvious benefits derived from the work done by the Justice Department and OSU. (A37). It is also interesting that the district court assumed that no one had profited from work done by the private practitioners.

The courts below also failed to determine if the time spent on this case was spent efficiently. It was virtually impossible to analyze the efficiency of counsels' work because a substantial amount of the fees award were based on undocumented hours. Where time records were submitted, they failed to meet the standards contemplated in prior decisions. *Northcross, supra* at 637; *Nadeau v. Helgemoe*, 581 F. 2d 275, 279 (1st Cir. 1979); *City of Detroit v. Grinnell Corp.*, 560 F. 2d 1093, 1102 (2nd Cir. 1977). The substandard nature of plaintiffs' time records is best illustrated by their appearance. (A53 - A62).

Many instances of poor record keeping, inefficient use of time, and the duplication of services were disregarded by the district court and overlooked by the appellate court. For example, the plaintiffs were able to collect $90.00 an hour for photocopying. (A49). The plaintiffs were permitted to charge for 52 hours work on a short memorandum dealing with an extraneous issue that was not filed with the Court until the fact of its existence became a question. (A49 - A51). The district court also allowed fees paid for the time of a clerk and attorney to drive to the Southern Ohio Correctional Facility and interview several prisoners. The trips were allegedly made on different days. Unrefuted testimony and evidence showed that the clerk and lawyer visited the institution together; saw the same prisoners at the same time; and

interviewed the prisoners about other cases. (A64 - A67).

The fact that most of the attorneys' fees ordered are to be paid to organizations also raises some interesting and unresolved issues. Plaintiffs' counsel can hardly claim that their work in this case precluded them from working on more lucrative matters. In fact, it appears that the ACLU, OSLSA, and Legal Aid have been awarded the type of "windfall" 42 U.S.C. Section 1988 supposedly prohibits. For example, the ACLU has realized a profit of approximately 800 percent in the time expended on this case. (A47). It should also be noted that Legal Aid and OSLSA, as recipients of Legal Service Corporation funds, are precluded from requesting attorneys' fees in a case such as this where private attorneys were not only available but involved. 45 C.F.R. Section 1609.

Organizations such as the ACLU may also be estopped. from profiting from the work done by lawyers under the recent decision in *National Treasury Employee Union v. United States Department of The Treasury, Internal Revenue Service*, 656 F. 2d 848 (D. C. Cir. 1981). That decision prohibits fee splitting between lawyers and organizations involved in activities other than the practice of law.

The confused and chaotic state of the law in the area of attorneys' fees has not only fostered excessive litigation but has left the legal profession and the judiciary open to criticism. The high degree of subjectivity involved in the awarding of attorneys' fees has resulted in a haphazard allocation of judicial resources on both the trial and appellate levels. It is also possible that litigation has been, or will be, unnecessarily prolonged for the sole purpose of increasing the fee award.

By ignoring the *Johnson* factors, the court below has not only issued an opinion in conflict with the opinions of other appellate courts but it has demonstrated a disre-

gard for the intent of Congress in enacting 42 U.S.C. Section 1988. This case offers an ideal vehicle to finally resolve the issue of reasonable attorneys' fees. Certiorari should be granted on this issue of national importance.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent class by forwarding such copies to Ohio State Legal Services Association, 155 North High Street, Columbus, Ohio 43215, American Civil Liberties Union, Suite 150, 360 South Third Street, Columbus, Ohio 43215, Alvin J. McKenna, D. Michael Miller, Alexander, Ebinger, Fisher, McAlister and Lawrence, 17 South High Street, Columbus, Ohio 43215, and Columbus Legal Aid Society, 40 West Gay Street, Columbus, Ohio 43215, via the U.S. Mail, this____day of December, 1981. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General
Counsel of Record

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No. 80-3662

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD E. STEWART, ET AL.,
Plaintiff-Appellees,

v.

JAMES A. RHODES, ET AL.,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed August 12, 1981

Before: EDWARDS, Chief Judge, WEICK and KEITH, Circuit Judges.

The Court delivered a PER CURIAM opinion. WEICK, Circuit Judge, (pp. 3-18) filed a separate dissenting opinion.

PER CURIAM. This action was commenced by several inmates at the Columbus Correctional Facility ("CCF") on behalf of all persons incarcerated at the prison. The inmates charged CCF prison officials with: (1) the unlawful segregation of prisoners by race, and (2) the use of certain types of physical restraints on the inmates. The complainants sought declaratory and injunctive relief against the CCF prison officials for the alleged unconstitutional conditions of confinement.

On July 13, 1979, the district court issued a preliminary injunction against the further use of physical restraints and the segregation of prisoners by race. CCF then perfected an interlocutory appeal of the injunction to this court.

In December 1979, before this court entered judgment on the appeal of the preliminary injunction, the parties signed a Consent Decree which incorporated the provisions of the July 13, 1979 order. After entry of the Consent Decree, the attorneys representing the plaintiffs moved for an award of attorney's fees. The district court granted fees in the amount of $117,020.34 for approximately 1850 hours of work. The defendants then appealed the award of the fees to this court.

Both appeals, the appeal of the preliminary injunction and the appeal of the award of attorney's fees, were consolidated for the purpose of oral argument. This court dismissed as moot the appeal of the preliminary injunction in our order issued from the bench on June 17, 1980.

We now hold that the district court's award of attorney's fees did not constitute an abuse of discretion. The defendants appealed the award alleging that the district court: (1) based its order for the payment of attorney's fees on the expenditure of an unreasonable number of hours; (2) failed to make deductions where a substantial amount of duplication existed; (3) failed to reduce the award of attorney's fees to reflect the fact that plaintiffs had caused or aggravated many of the conditions underlying their complaint; (4) improperly awarded plaintiffs' counsel fees for the work of paralegals; (5) failed to order attorney's fees based on a reasonable rate of compensation; and (6) failed to deduct a percentage of the requested attorney's fees for failure to keep accurate and contemporaneous records.

This court has thoroughly outlined the criteria for determining the appropriateness of an award of attorney's fees. *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The district court discussed and correctly applied the standards established in *Northcross*. The defendants have not raised any issues which were not raised below. The district court held an extensive hearing in which it addressed

all of the issues. We find no error in its findings of fact or conclusions of law.

Accordingly, the judgment of the district court, Judge Robert M. Duncan, is AFFIRMED.

WEICK, Circuit Judge, dissenting. I respectfully dissent. At the time the State caved in and agreed to the consent decree, its counsel, the Attorney General of Ohio, did not have the benefit of the recent double-cell decision in its favor of the Supreme Court in *Rhodes* v. *Chapman*, — U.S. —, (49 L. W. 4677) decided on June 15, 1981, or it would never have agreed to the harsh terms in the consent decree which called for closing down of the facility after December 31, 1983, and during the interim, periodic reduction of the number of prisoners and the initiation and maintenance of many programs which undoubtedly will cause the expenditure of huge sums of money. A copy of the consent decree is attached to appellee's motion to dismiss the appeal from a preliminary injunction in Case No. 79-3547 on the docket of this court.

As indicated in the attached editorial of the Akron Beacon Journal of June 22, 1981, the double-cell ruling won't end Ohio's prison woes.

Having found that the State was easy pickings, the attorneys for the plaintiffs sought to capitalize on it by asserting claims for attorneys fees and expenses of $144,946.21 in a case that had been pending only 19 months without trial and with a single court appearance on a preliminary injunction hearing of only a day and a half. In other words, substantially all of the hours claimed by the attorneys was office work claimed to be worth as much as $90.00 an hour.

I disagree with the majority holding that in the review of allowances of attorneys fees on appeal, it is necessary for the State to establish that the district court abused its discretion. In my opinion, it is necessary for the claimant to establish by reliable records and not mere guess or estimate the actual number of hours spent and what was done or accomplished in each of such hours and the fair and reasonable value thereof. *Northcross* v. *Board of Education*, 611 F. 2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). In my opinion, the record in this appeal is inadequate for appropriate appellate review.

In substance, three of the five groups preparing to litigate this case for 19 months requested fees and expenses totaling $144,946.21, claiming 2250 hours expended in preparation and settlement of the consent decree. The district court made the following allowances:

American Civil Liberties Union (ACLU)	$65,325.84
Ohio State Legal Services Assn.	$ 2,632.00
Legal Aid Society of Columbus	$16,464.00
Alexander, Ebinger, Fisher, McAlister and Lawrence	$32,598.50
Total	$117,020.34

The total allowance of $117,020.34 was for about 2250 hours of office work.

The State has not questioned the award to the Alexander law firm, no doubt because the district court found that "[C]ounsel . . . has provided excellent records of hourly services which appear to have been recorded contemporaneously with the performance." The State has challenged the other allowances principally because of lack of proper documentation of the time spent in preparing the case which was never tried.

The allowances made to ACLU by the court were as follows:

Ms. Jean Kamp

(1979)	491.75	hours at $90/hr.
	14	hours at $45/hr.
	9	hours at $63/hr.
(1978)	134	hours at $80/hr.
	14	hours at $15/hr.
Total	662.75	hours

Law Clerks

	178.75	hours at $30/hr.
	14	hours at $15/hr.
Total	192.75	hours

Ohio State Legal Services Association:

Clement W. Pyles, Esq.

(1978)	25	hours at $70/hr.
	18	hours at $49/hr.
Total	43	hours

Legal Aid Society of Columbus:

Clement W. Pyles, Esq.

(1979)	151.75	hours at $80/hr.
	9	hours at $56/hr.
	8	hours at $40/hr.
(1978)	1.25	hours at $70/hr.
Total	170	hours

Law Clerks

	113.75	hours at $30/hr.

These findings by the district court as to the number of hours spent were not based on "the excellent records of hourly services" upon which the findings as to the private law firm were based. By affidavit, Ms. Kamp merely estimated the time she spent from the period "from March 1978 through December 7, 1978." She did keep a "log" of the time spent on the case covering the period from December 7, 1978 to December 11, 1978, but unfortunately the "log" is not part of the record in this case. There is no claim made that such log shows what Ms. Kamp did in each hour reported in the log. Nor does the record show what compensation Ms. Kamp received from ACLU or whether that organization kept any records as to her time and performance.

Also by way of affidavit, Clement W. Pyles estimated the time he and the law clerks spent on the case but he had no records to support it or show what he or they was doing in that time.

At the hearing on the allowance of fees, both Ms. Kamp and Pyles testified as to their estimates of the hours spent on the case but did not support it by any documentary evidence.

A lawyer working for a private client, who sends his or her client a bill for services based on an hourly rate, would certainly have to document his claim if contested by showing not only the number of hours spent but what he did or accomplished in such hour. It makes some difference in the award of compensation as to what the lawyer was doing. Was he talking on the telephone, or conferring with a witness or another lawyer, writing letters, examining law, preparing a brief or motion or appearing in court. In the present case, there was no trial, only one appearance in court, attending a preliminary injunction hearing lasting one day and a half. The work was devoted to effecting a settlement of the litigation, namely the consent decree. Undoubtedly, there were numerous conferences between all of the lawyers. The ACLU and other lawyers also received substantial help and benefit

from the Department of Justice lawyers, as the government was made a party plaintiff as *amicus curiae*. The government claimed no compensation for the use of its attorneys. Help was also given by the college of law of Ohio State University.

It is obvious that counsel for plaintiffs could not prevail against a private client with the showing they made against the State. The State necessarily will have to pay any award of fees out of funds exacted from its citizens by taxation. Because counsel's fees will be taxed as costs against the State does not entitle them to a windfall. Also, the work done by the law clerks should have been documented and explained.

Appellants contend that counsel for plaintiffs have failed to "adequately document" the number of hours claimed. I agree. *Northcross* does not make clear what it means by "adequate documentation." The decision does indicate that the district court, in determining the number of hours counsel has expended, "must first take into account the affidavits of counsel." But the decision surely does not mean that a finding of the number of hours worked should be made exclusively on the testimony of counsel as to how many hours were expended and without any documentation. This conclusion is, I believe, supported by three elements of the *Northcross* opinion. First, this court was primarily concerned that the record on appeal was sufficient to allow it to review the district court's finding. Where, as here, the finding is based exclusively on the testimony of counsel, without the support of anything resembling billing sheets or office records, this court is in essence precluded from reviewing the district court's decision. This is so because the district court's finding rests exclusively on an assessment of counsel's credibility, something this court is not in a position to measure especially where there is no written record, but primarily after the fact estimates, against which to gauge counsel's credibility. Secondly, the premise upon which the *Northcross* decision was based was that counsel "should be paid 'as is traditional with attorneys compensated by a fee-paying client.'" *Northcross*,

supra, at 633. To the extent that the Attorneys' Fees Awards Act gives counsel the rights of an attorney of a fee-paying client, one would think that the Act imposes on counsel similar responsibilities. I believe it unthinkable that counsel would bill a client, particularly were the client to be billed so substantially, simply by estimating the hours spent on a case and without evidence as to how those hours were spent. Third, *Northcross* makes it clear that not all hours claimed are always hours for which the defendant should be charged. (see discussion below.) Yet, where as here counsel has not (and perhaps was not in a position to do so) attempted to break down how the hours were spent, defendants, and certainly this court, are in no position to determine whether certain of the hours spent should be compensated for at all or at the rate claimed by counsel. In short, this court is in exactly the same position that *Northcross* was designed to eliminate: an inadequate record upon which to review a fee award.

It should be noted, that the decisions of courts have indicated that counsel is required to "submit to the court a detailed record of the time spent on the case and the duties performed. The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours performed should be refused." *King* v. *Greenblatt*, 560 F. 2d 1024, 1027 (1st Cir. 1977) (citations excluded). *See also, City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448, 473 (2nd Cir. 1972) *quoting, Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 167 (3rd Cir. 1973). (these latter cases are not cases involving § 1988, but as *Northcross* indicates, the legislative history of § 1988 provides that fee awards are to be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." *Northcross, supra*, at 633, *quoting Senate Report No. 94-1011, reprinted* in 1976 U. S. Code Cong. & Admin. News p. 5908).

A specific procedure for handling the problem of documentation is set forth in Miller, *Attorneys' Fees in Class Actions* at 343-60 (1980, Fed. Judicial Center Publication).

As mentioned, one of the reasons requiring adequate documentation of the number of hours claimed by counsel is to allow the defendants, the district court, and this court to determine the extent to which certain hours claimed should be compensated for, or compensated for at a rate lower than the one claimed by counsel. *Northcross, supra,* at 636, specifically indicated that "hours may be cut for duplication, padding or frivolous claims." (The court further indicated that a percentage of the fee may be cut for duplication without a finding of the exact amount of such duplication. In the instant case, the fee award was decreased by a small amount to reflect duplication). Further, the court suggested that in determining the award the district court should consider the efficiency of the time spent. That is, the court indicated that the trial court should assess the time spent for specified services and determine whether "necessary services performed by attorne . . . could reasonably have been performed by less expensive personnel [i.e. law clerks or paralegals]". *Id.* at 637. Inefficient use of an attorney's time should not, the court suggested, be compensated for at an attorney's rate but at a law clerk's or paralegal's rate. *Id. Accord, King* v. *Greenblatt, supra,* at 1027. Here, the district court did not (and on the present record, probably could not) determine whether the hours claimed by counsel were not challengable under this standard. While this is an issue which this court ought to address, it suggests another issue which this court never expressly addressed: The extent to which the district court is to evaluate the reasonableness of the time claimed by counsel.

Northcross suggests, but does not in so many words say so, that counsel should not be compensated for hours worked which were excessive. Other courts have been more explicit than this court. *See e.g., Gagne* v. *Maher,* 594 F. 2d 336,

345 (2nd Cir. 1979) *aff'd*, 100 S. Ct. 2570 (1980); *King* v. *Greenblatt, supra*, at 1027; *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717 (5th Cir. 1974). This requirement follows simply as a matter of common sense: a reasonable fee based on the number of hours worked cannot be based on an unreasonable number of hours to accomplish a specific task. But it is supported by more than simply common sense. D. R. 2-106(B)(1) of the Code of Professional Responsibility provides, as an ethical principle, that a reasonable fee is one based, in part, on the time *required* to complete a task, not the time actually spent. To do otherwise, is to reward incompetence. *See Sharp* v. *Hui Wahine, Inc.*, 49 Hawaii 241, 413 P. 2d 242 (1966). Not to mention, it provides an incentive for "padding" and discourages quick settlement of cases. *See Grinnell, supra*, at 471. It should be mentioned, that the results of a survey (the results of which are published in *Attorneys' Fees in Class Actions, supra*, at 272-73) indicated that "the working of excessive hours is perceived as a widespread and serious abuse. Well over one-half of the responding judges thought attorneys often or always worked more hours than necessary. Attorneys did not think the problem was that serious, but even one-third of this group thought excessive hours were always or often worked, and only a small fraction would say this abuse never occurred."

In the instant case, I believe that a closer look is required at the reasonableness of the number of hours worked by counsel. This case was pending for only a year and one-half, there was but a day and one-half of in-court appearances, counsel had the benefit of the United States Attorney General's office and help from the Ohio State University, and, for the most part, the defendants (or at least it seems) agreed that the facility was not up to par and must be remedied. Nonetheless, the district court awarded fees based on 1850 hours. This figure should be compared to the 4839 hours involved in *Northcross*, a case involving 19 years of hard-

fought litigation, including several trips to this court and the Supreme Court. In short, I believe this court should (1) clearly state that district courts are to carefully "weigh the hours claimed against [their] own knowledge, experience, and expertise of the time required to complete similar activities." *Johnson* v. *Georgia Highway Express, Inc., supra,* at 717, and (2) remand for the district court's determination of whether the hours awarded were not excessive.

The "fair market value of the attorney's services" is the second variable in *Northcross'* basic formula for fee calculation. The court's analysis with respect to this issue is as follows:

> **A reasonable hourly rate:** We have indicated in several opinions that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided. Again turning to our mandate to award fees "as is traditional with attorneys compensated by a fee-paying client," a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee.
>
> In determining what the level of compensation for each category of service should be, the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance.
>
> Focussing on the fair market value of the attorney's services will best fulfill the purposes of the Fees Awards

> Act, by providing adequate compensation to attract qualified and competent attorneys without affording any windfall to those who undertake such representation. The entire purpose of the statutes was to ensure that the representation of important national concerns would not depend upon the charitable instincts of a few generous attorneys.

Northcross, supra, at 638.

The district court's analysis of this issue consists entirely of the following:

> The Court has reviewed the training, background, experience and skill of the attorneys. The Court is persuaded that the hourly rates requested by counsel are reasonable. It is noted that Ms. Kamp's 1979 hourly rate is $90.00. Her representation herein reflects her accumulation of extensive and specialized knowledge of prison condition matters. In her case the $90.00 per hour is reasonable.

On its face, I believe the district court's analysis is subject to challenge for a number of reasons. I note at the outset, again, that the record presented on this appeal is simply inadequate to allow this court to discharge its task of judicial review. This court has simply no idea what counsels' "training, background, experience and skill" might be, and it appears that it was this which formed the basis for the basic hourly rate. Aside from this, the award is subject to the following specific challenges.

(a) The premise of the *Northcross* decision was that attorneys were to be compensated at a rate determined by the fair market value for their services. That is, in the words of the decision, "the rates customarily charged in the community for similar services." The district court it would appear did not attempt to determine the prevailing wage rate for attorneys, but based the award simply on his review (on

what evidence?) of the "training, background, experience and skill of the attorneys." Though such factors are relevant, they must, under *Northcross*, be evaluated in the context of what these factors would mean in the real world: the world in which attorneys are paid by fee-paying clients for their services.

In this regard, the appellants have, during oral argument, claimed that they submitted to the district court the results of a survey by the Columbus Bar Association showing that the customary billing rate of attorneys in the community was substantially lower than that awarded by the district court. This survey has not been made a part of the record on appeal, but my own research confirms appellants' claims – specifically, two survey results published in two relatively recent issues of the Ohio State Bar Association Report, of which this court may take judicial notice pursuant to Rule 201, F. R. Evid. J. Kozelek, *1980 Economic Survey of the Columbus Bar Association*, Vol. LIV Ohio Bar 111 (January 26, 1981); *Lawyers' Earnings Were Higher in 1980 – Fees Up Too!*, Vol. LIV Ohio Bar 1052 (June 8(A), 1981). The first, published in the January 26, 1981, issue reports, *inter alia*, that in 1980 (note, that in this case the relevant time period is 1978 and 1979, and as the survey indicates, that rates were greater for 1980 than prior years) in Franklin County, (the County from which this case was "litigated" and from which counsel live and work) the average billing rates were as follows:[2]

[2] The same survey reports average yearly billable hours. It is more than interesting to compare this number with the number of hours claimed by counsel in this case.

Description	years of experience	billing rate
solo practitioner	1-5	$47/hr.
solo practitioner	10-20	$61/hr.
associate in firm with 2 to 10 lawyers		$49/hr.
partners in firm with 2 to 10 lawyers	19-20	$73/hr.
partners in firm with 2 to 10 lawyers	20-plus	$78/hr.
associate, large firm		$50/hr.
partners, large firm	10-20	$73/hr.
partner, large firm	20-plus	$85/hr.
law clerks		$25/hr.
paralegals		$31/hr.

Based on this survey, Ms. Kamp was awarded at a rate customarily charged for a partner in a large law firm with more than 20 years experience. In short, it appears doubtful that she could command $90 an hour in the local legal community. Mr. Pyles was awarded a basic rate roughly equal to a partner in a small or large law firm who had 10 to 20 years experience. Further, observe that law clerks in this case were billed at a rate greater than that prevailing in 1980.

In another survey, published in the June 8(A), 1981 issue indicated that the average hourly rate of all lawyers in 1980 in the Midwest is $50 an hour.

Aside from these surveys, there is more that indicates that the rate awarded to counsel was unreasonable. In another case, decided by the same district judge, Ms. Kamp's superior was awarded fees based on an hourly rate of $50/hr. for out-of-court-time and $75/hr. for in-court time. *See, Walking Elk Shadow* v. *George Denton*, Case No. C-2-79-999 (S. D. Ohio April 30, 1981) (a copy of which is included in appellants' "additional citations"). Observe also how carefully counsel in *Walking Elk* documented his hours and his qualifications, background, etc.)

(b) Not only is the award subject to challenge because the rate was not determined with reference to the local community, but it is clear that the district court simply ignored this court's admonition in *Northcross* to consider how the hours were expended in fixing the properly hourly rate. As indicated, above, Kamp was awarded 491.75 hours at $90/hr. in 1979 and 134 hours at $80/hr. in 1978 (there were also some insignificant hours for which the rate was lower). The district court did not – and counsel's documentation made it almost impossible – consider whether this was for in-court time, or whether it was even for legal work. It appears that this rate applies whether she was copying documents or preparing legal papers. The same can be said for the award to Pyles (at $70 to $80 an hour).

This case was brought to remedy what the State acknowledged was an inadequate facility. Nonetheless, for lack of funds, the State had no choice but to make do for the time being. As the attached Akron Beacon Journal editorial indicates, the State is now considering spending more than $432 million in building new facilities. But finding this money is not something that is particularly easy to do. This court does a disservice in awarding an excessive amount of money to attorneys who claim to want to aid the persons in the State prisons in the form of attorneys' fees that could be used to build the prisons the State is seeking to build.

I note finally that the allowances were not made to the attorneys who allegedly rendered the services but to the organizations by whom they were employed. I think it clear that this fact should not preclude an award of fees, but it does represent what all too commonly the Attorneys' Fee Awards Act has become: a means by which various groups can secure funding they cannot secure through the political process. As such, I would hold as the Second Circuit has held that it is perfectly proper for the district court to reduce a fee award to reflect the contribution of public funds to a

plaintiffs' attorney. *Gagne* v. *Maher*, 594 F. 2d 336, 345 (2nd Cir. 1979) *aff'd*, 100 S. Ct. 2570 (1980).

For the reasons hereinbefore set forth including an erroneous standard of appellate review, namely, abuse of discretion, I would reverse the allowances made by the district court and remand for further proceedings.

[EXCERPT FROM AKRON BEACON JOURNAL]

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Monday, June 22, 1981

Editorials

DOUBLE-CELL RULING WON'T END OHIO'S PRISON WOES

LAST WEEK'S Supreme Court ruling that it is not unconstitutional to lock two prisoners in a cell designed for only one at Ohio's maximum-security facility at Lucasville relieved at least one worry for Ohio's penal officials and lawmakers.

It wasn't at all clear what the state could have done if the decision had gone the other way and Ohio had later faced some court-mandated hard deadline for ending the practice.

But the 8-1 decision by the high court by no means ends Ohio's prison worries. The state's prisons are still bulging with far more felons than they were ever intended to house, and something badly needs to be done.

The central question is not "prisoner comfort," a concern without a large public constituency. It is instead some hard, practical considerations that bear on the manageability and of the prison system – and, in the long term, on public safety.

The recent new rash of prison riots underscores the difficulties penal officials face in trying to maintain order with unmanageable numbers of inmates jamming their prisons. Gross overcrowding causes emotional outbreaks so violent and affecting so many inmates that they defy orderly handling even by the toughest and best-trained disciplinarians.

It also increases the tendency of "correctional" institutions to serve instead as training schools for repeat crime, discharging streams of prison-hardened thugs to seek new victims.

In the long term, Ohio and many other states would be wise to strengthen mechanisms for management of alternatives

to imprisonment for offenders who present no real threat to public safety.

But for now the flow of new inmates into Ohio's prisons, whether or not this is the best way to dispose of their cases, shows no promise of abating. And there simply isn't room.

The Legislature is now debating an administration proposal for construction of at least five new prisons – all smaller than the one at Lucasville – and a major overhaul of the old one at Mansfield. And at least some of the new prisons would be closer than the existing ones to the major metropolitan centers from which most inmates come, improving the chances of maintaining the family contacts that offer the greatest promise of inducing offenders to go straight.

The argument of some from Cleveland that one of the prisons should be built there because the construction and operation would provide jobs where they are badly needed is a poor one; this is not a sound basis for prison siting. But Cleveland is indeed a good place for one, because some 17 percent of the state's prison inmates come from there.

The cost for the overall program will be high. It was first proposed at about $443 million, which has now been whittled in the Legislature to about $432 million. The ultimate figure, like every other detail about the plan, will be open to further debate and modification. And lawmakers know that spending for prisons has little blood-quickening appeal for most of their constituents.

But the long-term real cost of *not* attacking the problem could be far greater. The proposal or some close equivalent to it ought to get early legislative approval.

A - 20

Case No. C-2-78-220

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD E. STEWART, et al.,

vs.

JAMES A RHODES, et al.,

JUDGEMENT
Filed September 3, 1980

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, defendants are hereby ORDERED to pay the following total fees and expenses:

Organization	Amount
American Civil Liberties Union of Ohio Foundation, Inc.	$65,325.84
Ohio State Legal Services Assn.	$ 2,632.00
Legal Aid Society of Columbus	$16,464.00
Alexander, Ebinger, Fisher, McAlister and Lawrence	$32,598.50

Dated at Columbus, Ohio this 3rd day of September, 1980.

JOHN D. LYTER, CLERK

By:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-78-220

RONALD E. STEWART, et al.,

Plaintiffs

vs.

JAMES A. RHODES, et al.,

Defendants

ORDER
Filed September 3, 1980

This matter is before the Court for an entry of judgement on the matter of attorneys' fees pursuant to the Court's memorandum and order of July 25, 1980. For the reasons set forth in that order, it is hereby ORDERED, ADJUDGED and DECREED that defendants pay to the plaintiffs reasonable attorneys' fees and expenses as follows:

1. The American Civil Liberties Union of Ohio Foundation, Inc.

Attorneys' Fees		$57,182.50
Law Clerks		5,572.50
Expenses		2,570.84
	Total	$65,325.84

A breakdown of the above fees is as follows:

Attorneys' Fees

Jean P. Kamp, Esq.

(1979) 491 ¾ hours x $90	=	$44,257.50
14 hours x $45[1]	=	630.00
9 hours x $63[2]	=	567.00
(1978) 134 hours x $80	=	10,720.00
18 hours x $56[3]	=	1,008.00
	Total	$57,182.50

Law Clerks

178 ¾ hours x $30	=	$ 5,362.50
14 hours x $15[4]	=	210.00
	Total	$ 5,572.50

2. Ohio State Legal Services Association

Attorneys' Fees $ 2,632.00

Breakdown:

Clement W. Pyles, Esq.

25 hours x $70	=	$ 1,750.00
18 hours x $49[5]	=	882.00
	Total	$ 2,632.00

3. Legal Aid Society of Columbus

Attorneys' Fees		$13,051.50
Law Clerks		3,412.50
	Total	$16,464.00

Breakdown:

Attorneys' Fees

Clement W. Pyles, Esq.

(1979)	151 ¾ hours x $80	=	$12,140.00
	9 hours x $56[6]	=	504.00
	8 hours x $40[7]	=	320.00
(1978)	1 ¼ hours x $70	=	87.50
		Total	$13,051.00

Law Clerks

113 ¾ hours x $30	=	3,412.50

4. The law firm of Alexander, Ebinger, Fisher, McAlister & Lawrence, as counsel for plaintiffs in the consolidate case, *Wilson v. Denton*

Attorneys' Fees (including fees for law clerks and administrative clerks)		$32,204.38
Expenses		394.12
	Total	$32,598.50

Breakdown:

Alvin J. McKenna, Esq.

(1979) 105 hours x $85	=	$8,925.00
(1978) 100 ¼ hours x $75	=	7,518.75

D. Michael Miller, Esq.

(1979) 344 ½ hours x $75	=	$25,837.50
(1978) 77 hours x $65	=	5,005.00

Law Clerks

(1979) 14 ¾ hours x $30	=	$ 442.50
(1978) 32 ½ hours x $25	=	812.50

Administrative Clerk

(1979) 25 hours x $20[8]	=	500.00
	Total	$49,041.25
Less $2,032.50[9]		(2,032.50)
		$47,008.75
Less $1,002.50[10]		(1,002.50)
		$46,006.25
Less 30%[11]		(13,801.87)
		$32,204.38

To reiterate, pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, defendants are hereby ORDERED to pay the following total fees and expenses:

Organization	Amount
American Civil Liberties Union of Ohio Foundation, Inc.	$65,325.84
Ohio State Legal Services Assn.	$ 2,632.00
Legal Aid Society of Columbus	$16,464.00
Alexander, Ebinger, Fisher, McAlister and Lawrence	$32,598.50

The Clerk will enter judgement accordingly. So ORDERED.

Robert M. Duncan, Judge
United States District Court

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[1]Travel time (billed at one-half the full hourly rate). July 25, 1980, memorandum and order pp. 11-12.

[2]Reduction of 30% for duplication by "second chair." Memorandum and order pp. 7-9.

[3]Second chair reduction.

[4]Travel time (one-half full rate).

[5]Second chair reduction (30%).

[6]Second chair reduction (30%).

[7]Travel time.

[8]The fee allowed for administrative clerks is $20 per hour, *not* the $25 figure listed erroneously on page 12 of the July 25 memorandum and order.

[9]Messrs. Miller and McKenna stipulated to this reduction for fees incurred in connection with plaintiff Wilson's individual medical claim.

[10]Travel time reduction.

[11]*See*, memorandum and order, p. 9.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-78-220

RONALD E. STEWART, et al.,
Plaintiffs

v.

JAMES A. RHODES, Governor, et al.,
Defendants

MEMORANDUM AND ORDER
Filed July 25, 1980

This matter is before the Court on the application of plaintiffs' counsel for attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and for expenses incurred in the prosecution of the consolidated cases *Stewart v. Rhodes*, C-2-78-220 and *Wilson v. Denton*, C-2-76-741.

Counsel for all parties in both cases and attorneys for the United States Department of Justice, amicus curiae, have filed memoranda relevant to the issue of fees and expenses. By an order dated June 19, 1980, the Court ordered a hearing on these matters for the purpose of reviewing the fee requests in light of the standards set forth in *Northcross, et al. v. Board of Education of Memphis City Schools*, 611 F. 2d 624 (6th Cir. 1979). At a July 3, 1980, hearing evidence was received and argument heard.

After a careful consideration of the character of these

cases, the record, memoranda of counsel, the evidence, and the *Northcross* standards, and for the reasons below, the Court is persuaded that an award of fees and expenses should be made to each of the applicants.

The Counsel

Jean P. Kamp is trial attorney for the named plaintiffs and the class they represent in the *Stewart* case. While serving as trial attorney Ms. Kamp and certain support staff were employed by the American Civil Liberties Union (ACLU). Funds for their salaries and expenses were paid as a part of the ACLU's Project on the Rights of the Institutionalized. Attached to Ms. Kamp's application is her affidavit which sets forth an itemization of services performed and the number of hours spent in each activity, and a compilation of expenses incurred. The application also requests an award of compensation for the services of Robert P. App, a co-counsel until September 13, 1978. Ms. Kamp, by affidavit, sets forth an estimated account of hours spent by Mr. App on this case. In total, Ms. Kamp on behalf of the ACLU seeks $81,033.97 in fees and expenses through December 11, 1979, including compensation for law clerk and paralegal services which also are supported by itemized affidavits.

Clement W. Pyles, co-counsel for the *Stewart* plaintiffs, also has moved for an award of attorney fees. While serving as co-counsel in *Stewart*, Pyles was employed by the Ohio State Legal Services Association (OSLSA) and later by the Legal Aid Society of Columbus, Ohio (LAS). He has attached an itemized account of his services on an hourly basis. Compensation is also requested for law clerks whom he supervised. It is requested that $3,311.00 be paid to OSLSA and $18,358.75 to LAS. A number of

affidavits have been filed in support of the motion for fees.

Alvin J. McKenna and D. Michael Miller of the law firm Alexander, Ebinger, Fisher, McAlister & Lawrence, co-counsel for plaintiff in the consolidated case, *Wilson v. Denton*, Case No. C-2-76-741, have also applied for attorneys' fees and expenses. Attached as an exhibit to their application is an itemized account of services performed on an hourly basis, an account of expenses, a supporting affidavit, a summary, and a letter from counsel for defendants. They seek $47,402.87.

The Cases

The Columbus Correctional Facility (CCF), formerly known as the Ohio Penitentiary, is an old complex of buildings, some of which were constructed in the 1840's. Prior to 1972, it was the state's only maximum security prison. After the opening of the Southern Ohio Correctional Facility in Lucasville, Ohio, CCF was partially closed; however, because of the ever-increasing state prison population, CCF again has been pressed into full service. In 1979 it housed approximately 1700 inmates. The institution now serves as a preliminary receiving and processing center for other Ohio penal institutions for males, houses disabled and aged prisoners, receives disciplinary transfers from outlying Ohio institutions, and houses prisoners who are isolated in administrative, punitive and protective custody. Supervising officials and inmates at CCF, given the age of the physical plant, have been confronted with a myriad of problems relating to such items as plumbing, the electrical system, the heating system, the kitchen and laundry.

The *Stewart* plaintiffs filed this class action on March 9, 1978, mounting a constitutional attack on the

physical conditions at CCF and the alleged extensive inmate idleness, understaffing, inadequate religious, legal and recreational services, limited vocational and educational facilities, and poor medical care. In the *Wilson* case similar allegations were made. In both cases the parties sought damages and injunctive relief. The cases were consolidated and bifurcated, with damage issues to be tried at a later time.

Pursuant to the Court's order dated October 3, 1978, the United States Department of Justice was made an amicus curiae, and thereafter participated in the litigation.

The parties conducted extensive pretrial discovery including depositions and interrogatories, tours of the institution by counsel and by experts, and the interviewing of many witnesses. After motion and hearing, a preliminary injunction was issued. *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979). A number of pretrial motions were filed and responded to, and an extensive final pretrial order was prepared by counsel.

After many conferences among counsel, the amicus and often with the Court, a comprehensive consent decree was signed by the parties, counsel and the amicus curiae, and then approved by the Court on November 26, 1979.

Prevailing Parties

"In accordance with the broad remedial purpose of the statute [42 U.S.C. § 1988], parties may be considered to have prevailed when they have vindicated important rights through a consent judgment or without formally obtaining relief." *Northcross, et al. v. Board of Education, et al., supra*, 611 F.2d 624, 633.

Reference to the consent decree clearly reveals the extent to which all plaintiffs have achieved vindication of important rights. Under the terms of that decree CCF cannot be used to hold, detain, or incarcerate inmates after December 31, 1983. In the meantime the decree effects a limitation on prison population, provides for exercise and recreation and other programs. In addition defendants are required to meet minimum standards in areas such as sanitation and hygiene, maintenance, fire safety, medical and psychiatric care, religious services, legal access to courts, visitations, and others. The institution is by the decree enjoined from certain practices of racial segregation, and a policy concerning use of physical restraints is established. In sum it is abundantly clear that counsel for these plaintiffs have qualified as counsel for a "prevailing party" under § 1988.

ACLU, OSLAS, LAS

Although at all times during this litigation Ms. Kamp and Mr. Pyles and those for whose work compensation is sought by them were paid employees of the public interest organizations named above, an award of fees and expenses is nevertheless well within contemplation of § 1988. Fee awards to publicly funded legal organizations are not unusual. *See, e.g., Northcross, supra; Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978); *Dennis v. Chang*. 611 F.2d 1302 (9th Cir. 1980); *Reynolds v. Cooney*, 567 F.2d 1166 (1st Cir. 1978). Such cases instruct that the intent of Congress in the enactment of § 1988 was to foster the vindication of civil rights through litigation by such organizations that might otherwise not have the wherewithal to take on a big case such as this one.

Special Circumstances

In determining whether to employ its discretion in awarding compensation under § 1988, the Court must determine if special circumstances exist which would render an award inappropriate. As did the *Northcross* court, 611 F.2d at 634, I look to the case *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) to get a sense of guidance as to which "special circumstances" are such as to render an award of fees manifestly unjust. I find no such special circumstances.

Defendants call the Court's attention to a state Correctional "Master Plan" and suggest that, in view of that plan, the lawsuits were not the primary cause of settlement. Or more simply stated, the State of Ohio was planning unilaterally to accomplish many of the improvements at CCF agreed to in the Consent Decree.

However, as the memorandum of the amicus accurately points out, a preliminary injunction was involuntarily entered against the defendants in this case and relief in areas such as exercise and recreation programs, sanitation and hygiene, maintenance, fire safety, medical care, psychiatric care, disciplinary procedures, access to courts, mail, visiting, religious services, and staff are not even mentioned in the Master Plan. The existence of a Master Plan and funding for it is not a special circumstance which defeats an award under § 1988. Likewise, there is no merit to the argument that an award is barred since state officers are defendants. See *Hutto v. Finney*, 437 U.S. 678 (1978). However, the Court remains mindful that there is no evidence of bad faith on the part of the defendants and that public funds will be used to pay any sums awarded.

Northcross, supra, at 633, reminds that the amount of fees is to be governed "by the same standards which

prevail in other types of equally complex Federal litigation, such as antitrust cases." In setting such a standard the Court finds no basis for discriminating between counsel employed by a public interest organization and a private law firm. Neither § 1988 nor considerations of equity mandate limiting the Kamp and Pyles applications to an amount equal to the compensation received from their employer organizations, while compensating counsel for Wilson at a rate traditional with attorneys compensated by a paying client. The fact that Kamp and Pyles received salaries cannot serve to dilute the strength of the Congressional purpose of encouragement of legal action to vindicate constitutional rights. In the Court's view, a limitation on § 1988 awards to a public interest organization's salaried lawyers would tend to undermine that purpose.

Reasonableness

A. *Hours*

The *Northcross* court concluded that a fee calculated in terms of hours of service provided is the fairest and most manageable approach.

Ms. Kamp's affidavit states "that from March 1978 through December 7, 1978, the hours listed were reconstructed by examining each pleading filed by me during that period, estimating the hours required to prepare such pleading, and then substantially reducing such hours." From December 7, 1978, to December 11, 1979, she kept a log of time spent in the case.

Mr. Pyles' affidavit states that the hours listed in his application are estimates based on his case file, and that only such hours which could be adequately verified by written records in his case file are included.

At the evidentiary hearing, both Kamp and Pyles specifically testified regarding the method by which their computations were made. Needless to say, it is far more helpful to have accurate time records which are made contemporaneously with the performance of the services; however, the Court finds that both Ms. Kamp and Mr. Pyles, members of our bar in excellent standing, are highly credible. I find, therefore, that their designations of hours spent are substantially accurate and do not reflect padding or frivolous claims. This conclusion is also reached concerning the claims for the hourly services of law clerks and paralegals employed by ACLU, OSLAS and LAS.

Counsel for Wilson have provided excellent records of hourly services which appear to have been recorded contemporaneously with the performance. Moreover, defendants do not question the accuracy of the hours documented by Wilson's attorneys.

Duplication

Northcross holds that hours may be cut for duplication. "In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Northcross* at p. 637, citing *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978).

At the outset it is necessary to discuss the reasonableness of the *Stewart* class and plaintiff Wilson each having two attorneys. Pyles served as Kamp's co-counsel, generally filling a supplementary or back-up role which they refer to as the "second chair" position. McKenna and Miller both served as co-counsel for Wilson but do

not utilize a "second chair" concept, both sharing instead the total primary representation.

The Court notes that this is a case of some complexity (this issue will be discussed below), and that the defendants and amicus at all times during conferences and court appearances were each represented by at least two lawyers. Under all circumstances in the context of this litigation, I generally find the participation of two attorneys for the *Stewart* plaintiffs was reasonably appropriate. Plaintiff Wilson, however, is but a single member of the plaintiff class already represented by *Stewart* counsel and assisted generally by attorneys for the amicus. Although the Court cannot doubt the diligence of Messrs. Miller and McKenna, members in high standing of this bar, it simply cannot find it reasonable to compensate them both in full for the services rendered in this case, given the efforts of other counsel toward the same end.

In further examining the bothersome problem of duplicate services, it must be remembered that the *Stewart* plaintiffs commenced their class action lawsuit in an effort to close down the Columbus Correctional Facility and to recover damages. Wilson sued on behalf of a class complaining of CCF conditions and also sought damages. His lawyers were requested by the Court to represent him. The amicus represents the public interest. At times the *Stewart* plaintiffs and the amicus disagreed about the direction of the lawsuit. The *Stewart* lawyers wanted an immediate closing of CCF; the amicus and the *Wilson* lawyers did not take that primary direction.

When the parties had negotiating conferences, the *Stewart* lawyers and government lawyers often disagreed on what was and what was not proper compromise. Sometimes the *Wilson* lawyers agreed with *Stewart* and at other times with the amicus. However, on any number

of important matters, the amicus, *Stewart*, and *Wilson* lawyers were all in agreement and had quite similar demands and coordinated activities. In any event, the Court believes that each set of lawyers had to prepare for trial, tour CCF, participate in certain discovery including taking some depositions, prepare written documents for filing, interview witnesses, attend numerous conferences and hearings.

The Court, then, finds that there has been some duplication of services, but that it is impossible in all respects to accurately distinguish services which were duplicative of others.

First, using the *Oliver* theory, I believe that the *Wilson* lawyers were the beneficiary of the fruits of the *Stewart* and government efforts. That conclusion is not intended to detract from the excellent professional services of McKenna and Miller. Both lawyers were often instrumental in keeping the lines of communication open when the relationship between the *Stewart* lawyers and defense counsel became severely strained. In addition their legal documents were helpful and well prepared. Nevertheless, I find that a significant part of the *Wilson* counsel work was duplicative of that undertaken and performed by other counsel. Accordingly, I find it appropriate to reduce the award requested by *Wilson* counsel by thirty percent (30%).

In *Northcross* at 637, the Court of Appeals admonished that "if a district court decides to eliminate hours of service adequately documented by the attorneys, it must identify those hours and articulate its reasons for their elimination." The Court has already stated its reasons for reducing the request of *Wilson* counsel. In addition, the Court specifically finds that the request by both Kamp and Pyles for the following hours are duplicative:

Date	Kamp	Pyles
4/25/78 tour of CCF	6 ½ hrs.	6 ½ hrs.
6/5/78 depositions	6 ½ hrs.	6 ½ hrs.
6/6/78 depositions	4 hrs.	4 hrs.
Reviewing answers to interrogatories	1 hr.	1 hr.
3/12/79 depositions	5 ½ hrs.	5 ½ hrs.
3/19/79 depositions	3 ½ hrs.	3 ½ hrs.

I recognize that it may be helpful to have a second chair in attendance at a deposition or reviewing answers to interrogatories, or on a tour of CCF, but I cannot find it reasonable that such convenience should be subsidized at the full hourly rate requested by each counsel. Therefore the Court will reduce by 30% the hours claimed by each party for these activities.

Finding, however, that a second chair might well have been valuable for lead counsel in certain other activities, I will allow the fees requested for items such as negotiation and settlement conferences, which in this case were apparently often quite adversarial in nature, and for conferences with the Court. The participation of co-counsel for the *Stewart* class on such occasions was justified.

Deductions

Ms. Kamp has spoken by telephone with Robert App, a former co-counsel who participated in drafting the *Stewart* complaint and performing other services. Mr. App left the state while this cause was pending. He then estimated hours he spent on the case, including 6 ½ hours compensation for a tour of CCF on April 25, 1978. This

latter sum is entirely duplicative of the services performed by Kamp and Pyles on that tour and is disallowed. An award of compensation for three counsel under these circumstances is unreasonable. The item in Kamp's affidavit set forth as a reflection of App's telephone estimate "classifying photographs" in April 1978 is not understood and is disallowed. App also told Kamp that Anne Porter reviewed a Fire Marshal report and prepared an exhibit. Thirty hours are claimed for that service. The claim is disallowed without prejudice to the submission of an itemized statement of hours and dates the service was performed.

Travel Time

On June 6 and 7, 1979, Ms. Kamp traveled to and from the Southern Ohio Correctional Facility to interview witnesses. Fifteen hours compensation is sought for that service. Approximately three of those hours were consumed in travel. She traveled to Marion Correctional Facility and back on August 20, 1979, to interview witnesses. Two hours were spent traveling to and from the institution. Next, on August 23, 1979, three hours were spent in traveling to and from the Southern Ohio Correctional Facility. Similarly on November 21, 1979, a three-hour round trip was made to the Southern Ohio Correctional Facility. The affidavit of Daniel Costello, a law student clerk employed by the ACLU, shows that he presumably traveled to the Marion institution and also to the Southern Ohio institution on October 11, 1979; compensation is asked for 12 hours. Although it is not indicated that any of such time was spent in travel, since Ms. Kamp's applications for fees include travel time when she interviewed persons at the outlying institutions, I

infer that Costello's hourly statement also includes travel time of two hours for Marion and three for Southern Ohio. Likewise on October 31, 1979, a trip to Chillicothe involved two hours, and another trip to Marion on November 1, 1979, two hours.

Susan Tobin, a law student clerk employed by the ACLU, made the following trips: June 19, 1979, Chillicothe Correctional Institute, travel time two hours; August 22, 1979, Southern Ohio, three hours travel time.

Certainly, traveling on occasion is necessary for an attorney to serve a client. Travel time is not actually legally productive, as compared to in-office or in-court work. Lawyers, however, if not traveling could be performing other services and earning other fees or otherwise fulfilling the obligation of their employment. But under the circumstances of this case, I believe an award of fees for travel time based on the allowed total hourly rate would be unreasonable. Holding in mind the value of the time of the *Stewart* lawyers and support persons, an award for travel time in an amount of one-half the established hourly rate is fair compensation.

Similarly Mr. Pyles' application for compensation for a trip to New Orleans and return, eight hours spent traveling, will be paid at one-half his hourly rate.

Exhibit A to the McKenna and Miller application sets forth the following time spent on visits to correctional facilities:

3/13/78	to Southern Ohio Correctional Facility	3 ¼ hours
3/21/78	to Southern Ohio Correctional Facility	6 hours
6/9/78	to Southern Ohio Correctional Facility	20 hours
9/27/79	to Chillicothe Correctional Facility	11 ¾ hours

Based on the state of the record, however, there is no evidence from which the Court can determine whether

the hours listed above include travel time. Therefore, any award for such hours will be withheld until receipt of counsels' affidavit stating whether the hours include travel time, and if so, how many hours were spent traveling. Travel time will be paid at one-half the hourly rate.

Hourly Rates

Applicants for compensation request an award of fees based on the following hourly rates respectively:

Jean P. Kamp	$90.00	1979
	80.00	1978
Robert P. App	80.00	
ACLU Law Clerks	30.00	
ACLU Paralegals	25.00	
Clement Pyles	70.00	
LAS Law Clerks	30.00	
D. Michael Miller	65.00	1978
	75.00	1979
Alvin J. McKenna	75.00	1978
	85.00	1979
McKenna-Miller Law Clerks	30.00	
McKenna-Miller Adm. Clerks	25.00	

The *Northcross* standards dictate that "a scale of fees as is used by most law firms is appropriate to use in making fee awards." 611 F. 2d at 638. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance. The Court has reviewed the training, background, experience and skill of the attorneys. The Court is persuaded that the hourly rates requested by counsel are reasonable. It is noted that Ms. Kamp's 1979

hourly rate is $90.00. Her representation herein reflects her accumulation of extensive and specialized knowledge of prison condition matters. In her case the $90.00 per hour fee is reasonable.

At this time the Court is unable to make any award based on Mr. App's services. First, there is not enough information available to assist the Court in establishing an hourly rate for his work. Next, *Northcross* recites:

> The District Court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the *affidavits* of counsel. (Emphasis added.)

Although the Court has Ms. Kamp's affidavit relating what App told her, the Court deems it prudent to require App to submit his own affidavit. When it is received, the Court will consider compensation for his work.

Preparation of Fee Applications

McKenna and Miller do not request compensation for preparing their fee application. Kamp requests a total of 25 hours. As stated above, a part of her application was estimated after reviewing certain legal documents and other records. The Court has examined her written records of time spent. Well kept records serve to make the preparation of an application for fees a comparatively mechanical process. Rewarding poor record keeping by compensating counsel at $90.00 per hour for work necessary because of that fault is not proper. The Court cannot in good conscience require payment in the sum of

$2,250.00 for preparing an application under these circumstances. The Court will allow five hours compensation for Kamp's service in preparing the fee application.

Multiplier

In *Oliver v. Kalamazoo Board of Education*, 575 F.2d 714 (6th Cir. 1978), the Court of Appeals for the Sixth Circuit established a "bonus" multiplier, awarded to "compensate the attorneys for vindicating important but often unpopular constitutional rights." Commenting on the principle of a "multiplier" in *Northcross*, the Court of Appeals, finding that it is not to be awarded routinely, stated:

> Such a "bonus" would indeed be a "windfall," unnecessary to attract competent counsel, and grossly unfair to the defendants, who in most cases will be paying the award out of public funds. We see no reason to allow individual attorneys, no matter how important the rights they have vindicated, to receive unearned personal gain at the public expense. 611 F.2d 624, 638.

The *Northcross* court then delineates certain guidelines to be considered when a bonus is to be awarded. An hourly rate may not be reasonable when it does not take into account unusual time constraints, an unusually unpopular cause, or that the award may be contingent upon success. In addition a court can make an upward adjustment in compensation where there is increased risk of failure because for example, the law in the area is developing or the facts are strongly disputed. However,

in cases in which the facts are strong and the law clear, there is little risk of losing, and the attorney's normal billing rate will be adequate compensation. All the bonus factors are to be examined in order to award § 1988 fees that are reasonable. See *Northcross* at p. 624.

Ms. Kamp and Mr. Pyles have requested a bonus multiplier. The Court concludes that compensation based on their hourly rate is reasonable, and it is not necessary to award a bonus in order to fairly compensate any of the lawyers in these cases.

Undoubtedly, there are a number of conditions and practices at CCF that have demanded rapid correction in order to make the institution reasonably habitable until it is closed. I do not view this need for action as an unusual time constraint upon the attorneys involved. Further, many may view prison conditions cases as unpopular, but a review of the cases in the federal appellate court reports attests to plentiful litigation in this area. A review of this Court's docket does not indicate a shortage of such litigation. Many such matters are filed *pro se*, but there are a number of attorneys presently involved in prison conditions litigation. Moreover, such litigation does not produce the "social heat" that cases involving, for example, school desegregation or abortion may bring upon an advocate. Thus I do not view these cases as "unusually unpopular" within the meaning of *Northcross*.

Counsels' awards of fees in these cases were contingent upon success. Contingency alone does not mandate a multiplier, however. The nature of the contingency, and in particular the risk of losing, must be evaluated. In this regard, even without the benefit of hindsight, I believe at all times plaintiffs' chances of prevailing were substantial. There seems to be no factual dispute that the ancient, once virtually abondoned, institution was in a deplorable

physical state at the time this suit was brought. With regard to the issues on which the preliminary injunction was sought, the evidence, again largely undisputed in relevant areas, clearly indicated the existence at CCF of racial discrimination and a repressive use of individual physical restraints.

The numerous problems for inmates at CCF had to be sorted out by plaintiffs' lawyers, a process which took substantial time and patience. The Court is sensitive to the difficulty sometimes encountered in dealing with prison inmates. Fact disputes and legal contentions were at times rancorous, but they were not extraordinarily difficult or complex. Negotiations among the counsel eventually were fruitful.

The law of prisoner rights is still developing, and in perspective, is relatively new. Yet a substantial body of such law exists, and the number of cases in the federal courts currently involving prisoner matters is sizeable. I see nothing in the facts or law of this case so novel that it required a journey into an uncharted region of the law.

In sum, the problems presented by this case were essentially caused by its sprawl, not its intrecacy. For this, and the reasons stated above, the Court finds that an award of a bonus multiplier is not warranted.

Expenses

The itemization of expenses included in the application of the attorneys have all been examined, and I find them reasonable.

Conclusion

For the reasons stated above, the Court finds that attorneys' fees and expenses should be awarded in this case pursuant to 42 U.S.C. § 1988. Counsel are directed to submit proposed judgment orders to the Court in accordance with and reflecting the specific rulings above. The Court will then enter judgment promptly.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

Excerpt from pages 6, 9, 12, and 13 of the deposition of Jean P. Kamp taken on February 19, 1980 and filed March 3, 1980.

Page 6

Q. (by Adler) What's your rate of pay?

MR. CAMPBELL: We will object to that on the grounds of relevance.

MR. ADLER: You may answer over objection.

A. (by Kamp) My present salary is $22,000 a year.

* * *

Page 9

Q. That leads us to the next question of how your paralegal clerks are paid?

A. The two who filed affidavits in this case are paid through the work study program from Ohio State University, and both of them were hired for the purpose of working for the project. So I assume that a share of their salaries paid by us came from project funds. I am essentially certain of that.

Q. Do you know how much they are paid?

A. They are paid an hourly rate, and I don't know.

Q. Do you have any rough idea what it was?

MR. CAMPBELL: Again, I will object on the grounds of relevance.

Q. (by Adler) You may answer over objection, if you know.

A. The best I know is that they are paid approximately what law students are paid, and that most of that is paid by the university rather than the A.C.L.U. But I couldn't give any exact figures.

* * *

Page 12 and 13

Q. Can you explain, Jean, how you arrived at the hourly rate—maybe first you better, for the record, state what the hourly rate is.

A. $90 an hour.

Q. And how was that arrived at?

A. During the year 1979 and '80; during the year 1978—well, as I said, I have never charged on an hourly rate myself in the past, so that was derived at by looking at a number of cases, most of which are cited in my memorandum, discussions with other people in this office. But I think by far the most important thing was the affidavit filed by Alvin McKenna and Michael Miller who are also counsel in this case. And they, of course have extensive experience in billing by an hourly rate.

They asked for fees ranging from $60 to $80 an hour. Since I take their word for it that it's an average rate in this area and since I was the lead counsel, I felt it appropriate to ask for more than they were asking.

Excerpt from pages 15 and 16 of the deposition of Clement W. Pyles taken on February 21, 1980 and filed March 3, 1980

Pages 15 and 16

Q. (by Adler) Okay. Now, I believe you have asked for an hourly rate of $70 an hour while employed by the Ohio State Legal Services Association and $70 an hour while employed by the Legal Aid Society and $80 an hour—well,$70 and $80 an hour while employed by the

Legal Aid Society; is that correct?

A. (by Pyles) I believe it was based on the year rather than the employer.

Q. Okay. And you have also asked that your law clerks be paid at a rate of $30 an hour; is that correct?

A. That's correct.

Q. And could you tell me how you arrived at that rate?

A. Okay. Basically, in consultation with Jean Camp (sic) and based upon what private counsel in this, private counsel Pearly Wilson is charging in this case.

Excerpts from the transcript of the hearing held on the question of attorneys' fees on July 3, 1980.

Page 50

Q. (by Adler) November 24 in your affidavit you say one hour preparing copies for parties and in your notes you say xeroxing; is that the same thing?

A. (by Kamp) Yes.

Q. You don't have a secretary to do your xeroxing?

A. This was on a Saturday. As I recall, the decree was to go November 26, and you and Mr. Whinston had a problem with the delivery. He sent it by Federal Express and it didn't get here, it got lost, so I spent a Saturday morning xeroxing so everybody could have a copy the morning of the 26th.

Page 70

Q. (by Jacobs) Did you also prepare that motion for expungement that has been attached to the memorandum in this case?

A. (by Pyles) Yes, I did.

Pages 78-79

Q. (by Adler) About this expungement motion that you testified to on direct examination, do your recall what those affidavits said?

A. (by Pyles) In general, I did.

Q. What did they say?

A. The affidavits themselves would state that the "temperatures were cold and I had to do something to obtain clothes and blankets."

Q. What something had to be done?

A. Stealing, buying.

Q. Is that an offense in this State?

A. According to my knowledge, it is.

Q. Is stealing against prison rules?

A. I believe it is, according to what you told me.

Q. In other words, you folks provided the administration of that institution with affidavits from prisoners indicating that they had committed theft offenses and violated other prison rules?

A. Based on the unconstitutional conditions.

Q. Wouldn't it have been enough to say that "it was so cold the clothes I had wouldn't have been enough"?

A. I don't know. I didn't prepare the affidavit. It probably wouldn't have been accurate.

Q. Have you ever heard any lawyer, in your experience, recommending to a client appearing as a witness in a civil case that he confessed to a crime?

MR. JACOBS: I am going to object, your Honor. We are getting a little far afield.

THE COURT: Overruled. He may answer.

THE WITNESS: I have not done much criminal work myself, but I believe often an attorney could advise a client to plead guilty.

Q. (by Adler) I am talking about a civil case, a witness appearing in a civil case.

A. I would say not generally.

Excerpt from interrogatories answered by Ronald E. Stewart with the aid of Jean P. Kamp on September 10, 1979 and filed May 30, 1980.

DEFENDANTS' SECOND SET OF INTERROGATORIES TO PLAINTIFF RONALD E. STEWART #142-205

Instructions for Answering:

1. All information which is within your possession or control, or within the possession and control of your attorneys, agents or other representatives, is to be divulged.

* * *

3. State the names, addresses, employers, work positions and fields of expertise of all experts, technicians, physicians, engineers and others you intend calling as expert witnesses in any phase of this litigation.

This information is not presently known to plaintiff, but may be obtained from the United States Justice Department, Civil Rights Division.

* * *

/s/ Ronald E. Stewart

Sworn to and subscribed before me, this *10th* day of *September*, 1979.

/s/ Michael L. Ongalibang
Notary Public

Michael L. Ongalibang,
Notary Public Marion
County, Ohio
My Commission Expires
May 30, 1981

STEWART

12-7, 12-8 - 3 hrs preparing motion
12-11 1/2 hr conference
1/2 hr pre-trial
12-12 10 hrs - tour with Gordon
12-13 8 1/2 hrs - tour with Gordon
12-14 1 hr getting documents for Gordon
12-20 1 hr. Talk - to Adler
12-27 1 1/2 hrs. Supp. Mem in Support of Motion to Permit Conference with
1-15 4 hrs. P. & Application
1-16 2 hrs - interviewing and Sign
1-17 1/2 hr. medical care memo
1-18 2 hrs - conference of all attys
1-22 atty conference - 1 hr
1-23 P-T - 1/4 hr
atty. conference 1/2 hr
1-25 - 7 hrs - Adams' shackling
1-29 - 1 hr - interrogatories
1-30 - 1 hr - interrogatories
2-21 7 1/2 hrs - Tour with Gordon
2-22 8 hrs - " " "
2-23 7 " " " "
2-24 6 hrs - response to S.J.
3-1 " " "
3-2 5 " "

86 1/4

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3-6 - 1 hr - preparation of letter -
Stipulation of Facts
3-12 4 hrs - depositions
3-13 4 hrs - depositions
3-15 8 hrs - Fogel
3-16 5 hrs - Fogel
3-19 2½ hrs - depositions
3-20 8 hrs - Carson
3-21 5 hrs Carson
3-22 8 hrs - Rundle
3-23 - 5 hrs Rundle
- 9 5 hrs documents
4-10 6 hrs documents
4-11 2 hrs "
4-~~26~~ 6 1 hr motion
4-27 6 hrs depos
4-25 6 hrs depos
4-26 4 hrs depos
5-14 1 hr - [redacted] interview
5-15 1 hr - conference
¼ hr status conf
5-16 2 hrs - [redacted] interview
5-24 1½ hrs Coleman
5-30 1 hr witnesses, letter to Atty
6-5 7 hrs SOCF
6-6 8 hrs SOCF
6-10 1½ hrs Fogel
6-11 4½ hr in court - hearing
4 hrs preparation
6-12 6 hrs in court
2½ hrs preparation
6-13 2 hrs conference
6-26 2 hrs witnesses
6-27 6 hrs depos
130 ¾

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6-28	4½ hrs	depos Stalcup copy
7-10	4 hrs	interviews
7-12	1½ hrs	"
7-13	2 hrs	interviews
7-17	½ hr	letter re Wis. trip
7-27	2 hrs	attend Wis. trip
7-30	1 hr	
7-31	1 hr.	
8-6	3 hrs	depositions
8-7	5½	"
8-8	6 hrs	"
8-9	4 hrs	"
8-10	1½ hrs	documents
	1 hr.	conference
8-11	1 hr	interrogatories
8-15	3½ hrs	Motion for Protective Order
8-16	1 hr	conference
8-20	4 hrs	Marion - Steward Int
8-21	1 hr	[redacted] interview
	½ hr	Steward Int
8-22	1½ hrs	[redacted] Int
	½ hr.	Stoppert Int.
	1 hrs	witness list
8-23	4½ hrs (2 trips)	Int - Marion, Bilda
8-24	½ hr	Int
9-4	1½ hrs	Int 2nd Set
9-5	1 hr	Letter to [redacted]
9-6	2 hrs	- Reply Memo Re Protective Order
"	2 hrs	Response to Suppl Motion
9-7	2½ hrs	" " "
	1 hr	Preparing Exhibits
9-10	1 hr	"
9-11	2 hrs	"
9-12	2 hrs	"
9-13	3½ hr.	Stipulations
"	3 hrs	- Exhibits
9-14	2 hr	conference
	1½ hrs	exhibits

91½

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9-17 -	5 hrs.	P-T-order
9-18	5½ hrs	"
9-19	7 hrs	"
9-20	6 hrs	"
9-21	3 hrs	w Inness
9-24	2½ hrs	p-t-conference
	1½ hrs	Conference (J.P.)
9-25	2 hrs	Mot in limine
9-26	4 hrs	"
9-27	2 hrs	"
	2 hrs	Motion for Prot. Order
	½ hr.	Witness statements
9-28, 9-30	3 hrs -	master plan
10-1	1 hr	motions
	½ hr.	Stipulation of dismissal
10-2	4 hrs	Exhibits
10-4	2 hrs	depositions
10-8	7 hrs	exhibits
10-9	6 hrs	exhibits
10-10	1 hr	in court
	1 hr	conference
	1 hr	exhibits
	1 hr	memorandum
10-11	4 hrs	witness statements
10-12	4 hrs	preparation for hearing
	3¼	settlement pt
10-15	4 hrs	witness statements
		conference DOJ
		conference NTP
10-16	1½ hrs	interrog - instructions
10-17	1½ hrs	conference DOJ
10-18	3½ hrs	p-t - conference
10-19	1 hr -	documents
	89 ¼	

10-22 - 1 hr - Response to Motion in Limine
1 hr Trial brief
10-23 4 hrs Ds Interrogatories
1 1/2 hrs P-T Brief
10-24 2 1/2 hrs Trial brief
3 hrs - Settlement negotiations
10-25 1 hr Interrogatories
1 1/2 hrs brief
1 hr conference - Millington
10-26 1/2 hr - conference - Walnash
10-29 1 hr interrogatories
1/2 hr conference
10-31 1/2 hr interrogatories
1 1/4 hrs "
11-1 3 1/2 hr "
11-3 1 1/2 hrs - int.
11-4 1 1/2 " "
11-5 3 hrs - depositions
11-6 1 hr p-t brief
11-7 5 hrs "
11-8 5 hrs " "
11-9 2 hrs " "
4 1/2 hrs conference
1/2 hr conference
11-11 2 hrs - consent decree
11-12 7 1/2 hrs - p-t brief
11-13 7 1/2 hrs - " "
11-14 instructions, v.d.
10 hrs - settlement conference
11-15 3 1/2 hrs - consent decree
11-16 7 1/2 hrs - consent decree
82

Best Copy Available

11-18 -
11-19
11-20
11-21
11-23
11-24
11-26

1 hr - [illegible]
7½ hrs "
7¼ hrs "
6 hrs. "
4½ hrs - [illegible]
1 hr - [illegible]
2 hrs - [illegible]

29¼

86 1/4
130 3/4
97 1/2
89 1/4
82
29 1/4
38
553
71 1/2
29 1/2
454

Interviews with Plaintiffs -	15 hrs
Preparing Complaint -	5 hrs
Motion to Permit Entry	3 hrs
Motion for Order Appointing Amicus	2 hrs.
Motion for Protective Order 4-13-78 (including filing, conferences)	8 hrs
Preparing Interrogatories, ~~sent~~ mailed April, 1978	5 hrs.
Reply to Motion in Opposition to Plaintiffs Motion Re Amicus Pt- hearing	- 3 hrs. ½ hr.
Notices of Deposition, June, 1978 (including telephone)	2 hrs.
Preparing for depositions	2 hrs
6-5-78 Depositions of Denton, Pettigrew, Hoskins	6½ hrs
6-6-78 Depositions of Griffith, McKeon	4 hrs.
Answers to Int.	1 hr.
Request for Production	2 hrs
Memo in Opposition to Motion for Protective Order - 5-19	- 3 hrs
Second Set Interrogatories	1 hr.
Memo in Opposition to Motion for a Protective Order 7-26	2 hrs
4-25-78 - four	6½ hrs
3rd Set of Interrogatories -	1 hr.
Notice of Deposition - Rhodes	½ hr.
Order Certifying Class	- 2 hrs
	71 ½

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Memo in Opposition to Motion for Protective Order 9-11	2 hrs.
Response to Reply Memo	2 hrs
Motions of Opposition - Abramson, Prate, Hughes Programs	1 hr
Plaintiffs' Memo in Opposition to Motion for Judgment on the Pleadings	8 hrs
Memo in Opposition to Motion for Protective Order - 10-6	4 hrs
Memo in Opposition to Motion to Quash	2 hrs.
Memo in Opposition to Motion for Protective Order - 10-11	3 hrs
Depositions 10-17	3½ hrs
Response to Motion of US to Sever	4 hrs
	29½

80½
36

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3-9-78	Letter to Adler -	½ hour
5-24-78	Phone conversation and letter to Adler	½ hour
6-19-78	Discussion about experts with National Prison Project	½ hour
6-19-78	Letter to William Nagel	½ hour
6-23-78	Letter to Barbara Watter	
7-26-78	Letter to Adler	1½ hours
	Preparation of Order Corrections Class	3 hours
	Phone conversation with Adler	
	Letter to Adler	
8-29-78	Letter to Don Walsh	2 hours
	~~Conversation~~ Interview with Phil Hughes	
9-13-78	Letter to Adler	1 hour
9-15-78	Letter to Adler	3 hours
	Research	
10-2-78	Letter to Adler	¼ hour
11-6-78	Letter to Winston	1 hour
11-13-78	Letter to Adler	3 hours
	Research	
11-16-78	Letter to Bruce Lawson	¼ hour
11-16-78	Letter to Adler	1½ hours
	Phone conversations	½ hour
12-21-78	Letter to Winston	½ hour
1-16-79	Letter to Adler	½ hour
2-2-79	Letter to Adler	½ hour
4-4-78	Letter to Adler	½ hr.
5-1-79	Letter to Winston	½ hr.
5-2-79	" " Fennan	¼ hr.
7-2-79	Letter to Myers	½ hr.
7-6-79	Letter to Adler	½ hr.

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7-30	Letter to Adler	½ hr
8-1	Letter to Adler	½ hr
8 24	Letter to Adler	1 hr.
9-10	Letter to Adler	½ hr.
		25 hrs

Telephone Time 4¼ hrs

Expenses

To Bob 1/28 (pictures)	31.52
Telephone	- 115.86
Postage (Oct Nov.)	39.53
Mileage	91.00
D. Public Works	14.10
Franklin Blue Print	11.88
Misc.	26.99
Mileage	60.25
New Orleans Deposition	331.04
Mileage	87.60

Best Copy Available

Excerpt, Affidavit of Susan G. Tobin, filed December 12, 1979

8-1 6 hours - reading discovery and marking for trial exhibits

8-20 8 hours - travel time to Marion and answering interrogatories

8-22 8 hours - travel time to S.O.C.F. and answering interrogatories

8-23 1 hour - reviewing interrogatories

8-24 1 hour - reviewing interrogatories

8-28 5 hours - answering interrogatories at C.C.F.

Excerpt, Affidavit of Jean P. Kamp, filed December 12, 1979

8-20 4 hours - trip to Marion and preparation of Answers of Ronald Stewart

8-21 1 hour Witness - witness interview
1/2 hour - preparing Answers of Ronald Stewart

8-22 1 1/2 hours - witness interview
1/2 hour - preparing Answers of Ronald Stewart
1 hour - preparing witness list

8-23 4 1/2 hours - trip to S.O.C.F. and interview of Martin, Bolden

8-24 1/2 hour - Preparing Answers of Martin, Bolden
1 hour - Letter to Adler

9-4 1 1/2 hours - Preparing Answers of Martin, Bolden

Excerpts from Defendants' Exhibits D, filed June 26, 1980

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Thomas LeMaitre, #149-649, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

LeMaitre v. Denton, C-2-79-419

Jean P. Kamp (signed)
208 East Broad St.
Columbus, Ohio 43215

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Thomas LeMaitre, #149-649, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

LeMaitre v. Denton, C-2-79-419

Susan G. Tobin (signed)
Intern

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Elbert Morris, #146-363, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

Morris v. Denton, C-2-79-470

Jean P. Kamp (signed)
208 East Broad St.
Columbus, Ohio 43215

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Elbert Morris, #146-363, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

Morris v. Denton, C-2-79-470

Susan G. Tobin (signed)
Intern

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Dennis M. Wolfel, #145-554, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

~~*Stewart v. Rhodes,*~~ *Wolfel v. Denton*, C-1-79-89

Jean P. Kamp (signed)
208 East Broad St.
Columbus, Ohio 43215

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Dennis M. Wolfel, #145-554, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 o'clock a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

Wolfel v. Denton, C-1-79-89

Susan G. Tobin (signed)
Intern
203 E. Broad St.
Columbus, Ohio 43215

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Roy Martin, #143-744, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

Stewart v. Rhodes, C-2-78-220

Jean P. Kamp (signed)
208 East Broad St.
Columbus, Ohio 43215

REQUEST OF LAWYER TO SEE CLIENT

The undersigned lawyer, who certifies that he or she is an attorney in good standing and authorized by the Supreme Court of Ohio to practice law in the state of Ohio, requests to see Roy Martin, #143-744, an inmate at the Southern Ohio Correctional Facility, on the 23rd day of August, 1979 at 10:30 a.m.

The undersigned lawyer certifies that he or she has been retained to represent the above mentioned inmate either by the request of the inmate or a member of the inmate's family. The undersigned lawyer further certifies that he or she was retained in the following manner:

Stewart v. Rhodes, C-2-78-220

Susan G. Tobin (signed)
Intern
203 E. Broad St.
Columbus, Ohio 43215

Opposition

1

CASE NO. 81-1440

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

JAMES A. RHODES, ET AL.,
PETITIONERS,

VS.

RONALD E. STEWART, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CLASS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE A. CAMPBELL, Counsel
Of Record
ELINOR R. ALGER, Of Counsel
The American Civil Liberties
Union of Ohio Foundation, Inc.
360 South Third Street
Columbus, Ohio 43215
(614)228-8952

LOUIS A. JACOBS, Of Counsel
Clinical Programs of The Ohio
State University College of Law
1659 North High Street
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(614)422-6821

EDWARD PARKS, Of Counsel
The Legal Aid Society of
Columbus
40 West Gay Street
Columbus, Ohio 43215
(614)224-8374

JONATHAN W. MARSHALL Of Counsel
Ohio State Legal Service
Association
155 North High Street
Columbus, Ohio 43215
(614)221-2668

COUNSEL FOR RESPONDENT CLASS

QUESTION PRESENTED FOR REVIEW

WHETHER AN AWARD OF ATTORNEY FEES BASED UPON DETAILED AFFIDAVITS AND AFTER A FULL EVIDENTIARY HEARING SHOULD BE UPHELD IN A VIGOROUSLY CONTESTED CLASS ACTION TO CLOSE A DETERIORATING STATE PRISON WHEN LAWYERS DESIGNATED TO REPRESENT THE CLASS ENGAGED IN INTENSIVE PRE-TRIAL SCRIMMAGING, SECURED A PRELIMINARY INJUNCTION HALTING INMATE SHACKLING FOR PUNISHMENT AND RACIAL SEGREGATION AND NEGOTIATED, UPON THE EVE OF TRIAL, A CONSENT DECREE SETTING A CLOSE-DOWN DATE AND GRANTING INTERIM RELIEF?

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S.Rep. No. 24-1011, 94th Cong., 2nd Sess. (1976) 1,2,3

STATEMENT OF THE CASE

The genesis of this civil rights case was a Complaint filed in the United States District Court for the Southern District of Ohio in March, 1978. The Complaint pursuant to 42 U.S.C. §1983 alleged violation of various constitutional rights by state officials responsible for conditions and practices at a one-hundred and thirty-five year old, maximum security prison, the Columbus Correctional Facility (CCF). The suit was brought on behalf of certain named plaintiffs and a class of prisoners at the institution by Jean P. Kamp and Robert P. App, lawyers employed by the Project for the Rights of the Institutionalized (Project) of the American Civil Liberties Union of Ohio Foundation, Inc. (Foundation),[1] and by

---

1. The Foundation is a non-profit corporation, tax exempt under 26 U.S.C. 501 (c)(3), the sole function of which is the litigation of issues of public interest; it does not engage in activities other than the practice of law, as claimed by Petitioners. The Project is a specially funded and independently administered branch of the Foundation. Both the Foundation and Project are separate from The American Civil Liberties Union of Ohio which is a non-tax exempt affiliate of the American Civil Liberties Union, and unlike the Project and the Foundation, engages in lobbying.

Clement W. Pyles, a lawyer with the Ohio State Legal Services Association (OSLSA) and later with The Legal Aid Society of Columbus (Legal Aid).[2]

The complaint challenged the totality of the conditions of confinement at CCF as well as specific constitutional violations relating to "extensive inmate idleness, understaffing, inadequate religious, legal and recreational services, limited vocational and educational facilities, and poor medical care." Petition (hereafter P.) at A 31.

---

2. Legal Aid and OSLSA are both legal service organizations funded in part by the Legal Services Corporation. Their participation in this case was pursuant to Regulations of the Legal Service Corporation, in 45 C.F.R. §1609.7 which provides in relevant part:

> Nothing in this part shall prevent a recipient [of Legal Service Corporation Funds] from:
>
> * * *
>
> (c) Acting as co-counsel with a private attorney when appropriate, and accepting part of any fee that may result from a shared case.

The principal relief demanded was the close-down of the institution. Additionally, plaintiffs asked for interim injunctive relief from the conditions cited and for damages. A class consisting of all present and future inmates of CCF was certified, and attorneys Kamp and Pyles were designated to represent it.

Upon the Motion of the plaintiffs the United States Department of Justice was named as amicus curiae to represent the public interest and was given the full rights of a party in the litigation. Due to the superior resources available to it, amicus undertook a substantial but by no means "exclusive"[3] role in the extensive discovery process and the mar-

---

3. In the Memorandum of the United States in Response to Defendants' Memorandum on Attorneys Fees filed June 17, 1980, lead counsel for the Justice Department states:

> The Government's position in this litigation has been clear from the beginning. As amicus, we represent neither the plaintiffs nor the defendants but rather the public interest.
>
> * * * *
>
> Contrary to defendant's assertion, the government was not the sole discovering party. Rather, for reasons of convenience, we took the lead in formulating discovery.

Id. at 4.

shalling of expert witnesses in the case. Unlike the lawyers directly representing the class, however, amicus did not urge the closedown of CCF. In addition,"the Stewart lawyers and government lawyers often disagreed on what was and what was not proper compromise." Memorandum and Order of Judge Robert Duncan filed July 25, 1980, P. at A 36.

In October, 1978, shortly after the appointment of the Justice Department as amicus, the case of Wilson v. Denton, No. C-2-76-741, was consolidated with the Stewart case. Mr. Wilson, who had filed a pro se action on behalf of himself and a class of prisoners held at CCF, was represented by appointed counsel, Mr. Alvin J. McKenna and Mr. D. Michael Miller, members of a private law firm.

Throughout its course, the case was, in the words of the District Judge, "quite adversarial." P. at A 38. Seven motions for summary judgment or judgment on the pleadings were filed by the Petitioners and denied by the Court. Lawyers for the class were required to apply to the Court for orders allowing access to class members and for other

determination which normally would be made amicably between opposing counsel without resort to court intervention. In addition "[t]he parties conducted extensive pretrial discovery including depositions and interrogatories, tours of the institution by counsel and by experts, and the interviewing of many witnesses. . . .A number of pretrial motions were filed and responded to, and an extensive final pretrial order was prepared by counsel." P. at A 31.

In May, 1979, the lawyers for the class and amicus filed simultaneous motions for a preliminary injunction to ban racial segregation in cell assignments and the use of four-way metal restraints to chain prisoners to beds for days and sometimes weeks at a time with little or no medical supervision as a method of punishment. Judge Duncan issued such an injunction after a two day evidentiary hearing in June, 1979. Stewart v. Rhodes, 473 F.Supp. 1185. The petitioners took, and the respondents' lawyers were forced to respond to, an interim appeal of this injunction. The appeal was later dismissed over the objection of the petitioners by the Sixth Circuit as moot since the provisions of the

Preliminary Injunction were incorporated in a Decree to which petitioners consented. Stewart v. Rhodes, No. 79-3547 (unreported decision of June 22, 1980), Respondents' Appendix.

The case in chief was scheduled for jury trial. "After many conferences among counsel, the amicus and often with the Court, a comprehensive consent decree was signed by the parties, counsel and the amicus curiae, and then approved by the Court on November 26, 1979," the day of trial. P. at A 31. The Decree provided for the total close-down of CCF by the end of 1983. As interim relief, the order mandated wide-ranging improvement of almost all the conditions originally cited in plaintiffs' Complaint. "Reference to the consent decree clearly reveals the extent to which all plaintiffs have achieved vindication of important rights." P. at A 32.

Individual inmates were, by the terms of the Consent Decree, left free to pursue personal claims for damages, and the Decree further recognized the right of plaintiffs' counsel to apply for attorney fees under the Civil Rights Attorneys' Fee Awards

Act, 42 U.S.C. §1988.

Jean P. Kamp of the Project, who had assumed the role of lead counsel throughout the case, requested fees at the rate of eighty dollars ($80.) per hour for the initial part of the case and ninety dollars ($90) per hour for latter portions[4] for over seven hundred (700) hours she had spent on the case and for thirty dollars ($30) per hour for approximately two hundred (200) hours of work on the case by law clerks. Robert App who, while employed by the Project, acted as co-counsel until September 1978, submitted through Ms. Kamp an estimate of hours he spent on the initial phases of the case for which fees were requested at eighty dollars ($80) per hour.

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4. Ms. Kamp based her hourly rate request upon her experience, as evidenced by a resume submitted to the court with the Motion for fees, the complexity of the case, her role as lead counsel for the class, prevailing rates in the community for difficult federal litigation, and the rate charged by similarly qualified counsel in reported prison and civil rights cases. See Memorandum in Support of Plaintiffs' Application for Attorney Fees and Expenses at 2.

The work of a paralegal assisting App was billed at twenty five dollars ($25) per hour.

Bruce A. Campbell, the Legal Director of the Foundation,[5] and a law professor Louis A. Jacobs[6] did work on the case at the behest and direction of Ms. Kamp, but no request for fees was made for their time.

Clement W. Pyles, on behalf of Legal Aid and OSLSA, his employers during the course of the litigation, applied for fees at the rate of seventy dollars ($70) per hour for work done in the initial stages of the case and eighty dollars ($80) per hour for his later work. He documented over three hundred (300) hours spent on the case by himself and approximately one hundred (100) hours of law clerks' time

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5. Contrary to the assertion of Petitioners at P.11, Bruce Campbell was not at any time the "supervisor" of Jean Kamp, counsel for the Project.

6. Mr. Jacobs did not enter an appearance in the case until Nov. 1, 1978.

for which he requested thirty dollars ($30) per hour.

The private law firm which employed Messrs Miller and McKenna who represented respondent Wilson submitted a fee request billing Mr. McKenna's over two hundred (200 hours) at seventy five dollars ($75) and eighty five dollars ($85) per hour and Mr. Miller's four hundred plus hours at sixty five dollars ($65) and seventy five dollars ($75) per hour. Law clerks' and administrative clerks' time was billed at thirty dollars ($30) and twenty dollars ($20) per hour respectively.

The District Court held an evidentiary hearing in July 1980 and received memoranda on the various fee requests and petitioners'objections to them. In a lengthy, detailed Memorandum and Order, P. at A 28-A 46, Judge Duncan held respondents had "achieved vindication of important rights," P. at A 32, and found it appropriate to award fees at the rates requested based upon the "training, background experience and skill" of the various attorneys. P. at A 41. In particular, the judge noted that Ms. Kamp's representation "reflects her accumula-

tion of extensive and specialized knowledge of prison condition matters" and held that "[i]n her case the $90.00 per hour fee is reasonable." P. at A 42.

The Court took account of Ms. Kamp's affidavit and testimony to the effect that for work done on the early part of the case, "the hours listed were reconstructed by examining each pleading filed by [her] during that period, estimating the hours required to prepare such pleading and then substantially reducing such hours" and that she kept a contemporaneous log of her time thereafter. P. at A 34. With respect to Mr. Pyles, the Court noted that his affidavit indicated that his application reflected "estimates based on his case file, and that only such hours which could be adequately verified by written records in his case file are included." Ibid. He found them both to be "highly credible" and held that "their designations of hours spent are substantially accurate and do not reflect padding or frivolous claims." P. at A 35.

While the District Court felt it appropriate to deduct thirty percent (30%) of the Miller-McKenna

claim for duplication inasmuch as these lawyers represented only a single plaintiff, it concluded that, as this was a case of "some complexity..., participation of two attorneys for the [class] was reasonably appropriate" and, thus, did not order a blanket deduction as to the claims of Kamp and Pyles. P. at A 36. Nevertheless, some deduction was made from their claims because of duplication of hours at depositions, P. at A 38; Ms. Kamp's claims for certain travel time were reduced, P. at A 39; App's time was held to be inadequately documented, P. at A 38-A 39, and part of the time spent by Ms. Kamp in preparation of the fee application itself was disallowed. P. at A 42. Finally, the Court held that the use of a "bonus multiplier" was not warranted in this case. P. at A 43 - A 45.

Based on this decision, the District Court, on September 3, 1980, ordered petitioners to pay approximately sixty five thousand dollars ($65,000) in fees for Jean Kamp's efforts, Nineteen thousand ($19,000) for Clement Pyles and thirty three thousand ($33,000) for Miller and McKenna. The petitioners sought, but

were denied, a stay of this order. Upon the posting of a bond by respondents, the fees were paid by the petitioners.

The petitioners on October 2, 1980 filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit and subsequently perfected that appeal. After briefing and argument, the Circuit panel consisting of Judges Edwards, Weick and Keith affirmed (with Weick dissenting) the fee award of the District Court. P. at A 2 - A 17. A Petition for reconsideration and a Suggestion of Appropriateness of En Banc Consideration was filed by Petitioners, but these requests were denied.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO STANDARDS TO BE USED FOR THE AWARD AND REVIEW OF FEES UNDER 42 U.S.C. §1988.

Every Circuit, as petitioners have acknowledged, has approved and uniformly applied standards for fee determinations under 42 U.S.C. §1988. These standards, derived from Johnson v. Georgia Highway Express, Inc., 488 F2d. 714 (5th Cir. 1974), specify twelve criteria to be addressed by trial courts in assessing reasonable fee awards.

Congress, in passing the 1976 Fees Award Act,[7] expressly recognized and adopted the Johnson standards in its Reports[8] making clear its belief that these standards had proven themselves adequate to guide the exercise of discretion

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7. Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641 amending 42 U.S.C. §1988.

8. H.R. Rep. No. 94-1558 94th Cong., 2nd Sess. (1976); S.Rep. No. 24-1011, 94th Cong. 2nd Sess. (1976). See also: Larson, Federal Court Awards of Attorney's Fees, 4-7 (Law & Business, Inc., 1981).

by trial courts in fee awards. Referring to Johnson and to other cases in which the Johnson standards had been used,[9] the Senate Report commented:

> ...These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys..."
> S.Rep. at 5

As the Sixth Circuit has said in Northcross v. Board of Education of Memphis, 611 F2d. 642 (1979) cert. denied, 447 U.S. 911 (1980):

> ...[S]ection 1988 is a rare statute with sufficient legislative history to provide [A] clear-cut indication that Congress considered [many of] the exact problem[s] with which we are now confronted and provided an express indication as to how the general language of the 1976 statute was intended to be applied. Under such a circumstance (relatively rare in this court's experience), we of course, follow Congressional intent.
>
> Id. at 633 quoting Seals v. Quarterly County Court, 562 F2d. 390, 394 (6th Cir. 1977)

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9. For an extensive list of cases applying Johnson see: Dopke, "Calculation of a Reasonable Award of Attorney Fees Under the Attorney's Fee Award Act of 1976," 13 John Marshall L.R. 378, 345 at n. 51 & 52 (1980).

In the same way that pre-existing case law on standards for reasonableness in fee awards was adopted by Congressional reference to it in the Reports accompanying the 1976 Act, so too was a body of developed law defining a "prevailing party" expressly approved in the Reports of both houses. Citing a line of cases including Kopet v. Esquire Realty Co., 523 F.2d. 1005 (2nd Cir. 1975), the Senate, for example, indicated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment...", S.Rep. supra, at p. 4. This Court recently recognized this intent in Maher v. Gagne, 448 U.S. 122 (1980) and held that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." Id. at 129.

Both Congressional Reports also cited with favor cases consistently recognizing that public interest and public service lawyers are entitled to awards of fees upon the same basis in the same amount as private counsel in comparable cases. This Court noted precisely that aspect of the legislative history of the 1976 Act two terms ago in New

York Gaslight Club, Inc. v. Carey, 447 U.S. 54 at 70-71 (1980).

It has long been established that the award of adequate fees under statutes authorizing them is the norm. In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), a case arising under Title II of the Civil Rights Act of 1964,[10] the Court expressed the principle "that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id. at 402. Petitioners have attempted to divine "special circumstances" from the nature of the organizations claiming fees here, but that attempt is misplaced given settled law and clear legislative intent as to these arguments.

In an oblique reference petitioners seem to call into question the eligibility of the organizations providing counsel for the respondent class in

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10. 42 U.S.C. §2000 a-3(b)

this case to receive fee awards. P. at 13. With respect to Legal Aid and OSLSA a general reference is made to Regulations of the Legal Services Corporation at 45 C.F.R. §1609 restricting Legal Services lawyers from undertaking certain fee-generating work. Petitioners have, however, apparently overlooked §1609.7(c), supra, at n. 2 which expressly allows the acceptance of fees by Legal Service organizations as a co-counsel in a case shared with private counsel, as was the situation here.

Moreover, Congress made clear its intention that Legal Service organizations should participate in §1988 fee awards by explicit recognition of cases such as Incarcerated Men of Allen County v. Fair, 507 F. 2d 281 (6th Cir. 1974); Torres v. Sacks, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd 538 F.2d 10 (2d Cir. 1976); Fairley v. Patterson, 493 F. 2d 598 (5th Cir. 1974), in which fees were awarded to such organizations upon the same basis as fees to any other applicant. H.Rep. at 7 n. 16. For an excellent statement of the rational for awarding fees to Legal Service organizations see: "Award of Attorney's Fees to Legal Aid Offices," 87 Harv.L.R. 411 (1973).

As to the ACLU Project, petitioners are plainly wrong in the assertion that "ACLU may also be estopped from profiting from the work done by lawyers under the recent decision in National Treasury Employees Union v. United States Department of The Treasury, Internal Revenue Service, 656 F.2d. 848 (D.C. Cir. 1981)" which they say "prohibits fee splitting between lawyers and organizations involved in activities other than the practice of law." P. at 13. Despite petitioners repeated misstatements to the contrary, the ACLU Project and the Foundation of which it is a part have, as is detailed in footnote 1, supra, no function other than litigation. Cf. In Re Primus, 436 U.S. 412 (1978).

The "universal acceptance"[11] of the Johnson standards to determine the reasonableness of fee requests and the uniformity shown by lower courts in applying the "prevailing party" doctrines is testimony to the efficacy of these criteria and the

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11. Dopke, supra at 345.

fact that this Court's review of them is not indicated. The lower courts have found within the Johnson framework and existing case law both the guidance and the range of discretion necessary to make awards appropriate to the wide variety of circumstances presented by individual cases. The variance in awards, far from being as petitioner suggests an indication of disharmony among the courts applying the standards, is, in reality, proof that the system is working. The District Courts and Circuit Courts in the setting and reviewing of fee awards are not adhering to wooden formulas but are closely examining the underlying circumstances relevant to such awards.

Using the appropriate criteria based upon settled precedent a reasonable award of fees was made to a clearly prevailing party in this case. The process that produced that result does not demand the scrutiny of this Court.

II. THE FACTUAL DETERMINATIONS AND DISCRETIONARY JUDGMENTS, INTRINSIC TO APPLICATION OF THE STANDARDS UNDER 42 U.S.C. §1988, WHICH WERE MADE BY THE DISTRICT COURT AFTER FULL AND FAIR HEARING, REVIEWED AND FOUND REASONABLE BY THE CIRCUIT COURT PANEL AND TURNED DOWN FOR RECONSIDERATION BY THE SIXTH CIRCUIT EN BANC, DO NOT PRESENT SPECIAL AND IMPORTANT QUESTIONS FOR REVIEW BY THIS COURT.

This Court has delineated its role in the review process by distinguishing between disputes over factual issues and controversies over important legal questions. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). This is particularly true when both the District and Appeals Courts have reviewed the facts as in the case at bar. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

Examination of the specific examples offered in the Petition to support their position that the lower Courts ignored prior decisions shows that

petitioners are not challenging whether the Courts adhered to prior law on standards recognized by all the Circuits; instead, they are really challenging the specific factual determinations unique to this case and the discretionary judgments based on those factual determinations. This Court should decline petitioners' invitation to engage in such purely factual review.

Petitioners state flatly that the District Court made no attempt to ascertain the fair market value of services rendered by counsel for the class. P. at 10. In fact, the District Court had counsel's affidavits, precedent, its own knowledge of attorney fees, and testimony at the evidentiary hearing. P. at A 48.

Counsel had looked to the hourly rates requested in affidavits submitted by Messrs McKenna and Miller as indicative of the hourly rates charged by private attorneys in this community providing the kind of services rendered in this case. They compared their experience as presented in their affidavits and the nature and level of their involvement in this litigation with that of Messrs McKenna and Miller, who

claimed no particular experience in prison litigation, represented only a single plaintiff rather than the entire class, and were not lead counsel as was Ms. Kamp.

There could be no closer comparison for fair market value purposes than with hourly fees normally charged by private attorneys practicing in the same city and working on the same case. The fact that petitioners have never challenged the hourly rates of Messrs McKenna and Miller gives further credence to the fact that those rates represent an accurate guide to fair market value.

Furthermore counsel for the class, in their applications for attorney fees and in reply memoranda in support of those applications, presented the District Court with ranges of fees awarded in other 6th Circuit cases, including Northcross, supra, and Oliver v. Kalamazoo Board of Education, 576 F2d. 714 (1978), as well as in prisoner rights cases in other Circuits. The fees requested fell well within the range of fees upheld elsewhere for similarly complex federal litigation.

In its Memorandum and Order awarding attorney

fees the District Court stated it had "reviewed the training, background, experience and skill of the attorneys." P. at A 41-A 42. In finding the hourly rates requested by counsel for the class "reasonable," P. at A 41, the Court had before it counsel's affidavits, including their resumes describing their legal training and experience, and in the case of lead counsel, Ms. Kamp, a description of prison litigation cases she had responsibility for as staff attorney for the Project, which concentrated on litigation involving the rights of prisoners.

Even more importantly, the District Court had first hand opportunity to evaluate the skill of the attorneys. The Court was continually drawn into this litigation, not only in ruling on the numerous motions filed and presiding at the hearing on the preliminary injunction and the evidentiary hearing on attorney fees, but also by personally participating in some of the lengthy negotiating sessions which led to the consent decree. To justify a higher rate the Court found that "[Ms. Kamp's] representation . . . reflects her accumulation of extensive and specialized knowledge of prison condition matters."

P. at A 42.

Petitioners did not offer the District Court a particle of evidence that the market value of legal services in difficult federal litigation is less than that claimed by the respondents. In a belated effort to obscure this omission, petitioners introduced for the first time in their Petition a survey of fee rates which was never placed in the record below, never subject to adversarial examination and never shown to be relevant to the precise questions at issue here.[12] The survey is, on its face, incapable of performing the function petitioners would ascribe to it. P. at 10. Based upon responses from a scant 40% of the practicing bar in the area, it surveys only "average" billing rates without consideration of specialized expertise or complexity of the task undertaken.

In another post-hearing attempt to fill this evidentiary void, petitioners, in a supplementary filing in the Circuit and again in this Court, P. at 11, claim that the fee award to Ms. Kamp was

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12. See Fed. Rule of Evidence 201.

"twice that awarded by the same district judge for work done at the same time in a similar case to Ms. Kamp's supervisor." With this allegation petitioners have created a supervisor that at no time existed, have labeled a case similar that is dissimilar, and have referred to a case not in the record. Ms. Kamp was the supervisor of the Project she directed and was under no one else's supervision. The "similar" case referred to was not a class action, involved no discovery, consisted of no complex issues and involved no intricate settlement negotiations. The ACLU attorney who handled the case was at that time less experienced in §1983 prison litigation than was Ms. Kamp.

With respect to the number of hours claimed and the manner in which those hours were spent in litigating the case, petitioners state, as they have in each earlier request for review, that the District Court failed to engage in the proper analysis. P. at 11. In fact, the District Court, on the basis of counsel's affidavits and detailed testimony at the evidentiary hearing, found counsel "highly credible," and that their hours claimed were "substantially

accurate" and did not "reflect padding or frivolous claims." P. at A 35.

Ms. Kamp explained in her affidavit that the hours for the first seven months of the case were determined in part by examining each pleading she filed, calculating the hours required to prepare it, and then, to avoid any suggestion of overstatement, substantially reducing those hours. P. at A 34. Furthermore she verified the accuracy of other hours because they were based upon times confirmed by court reporters in depositions and hearings, or because they referred to joint appearances with Messrs McKenna and Miller whose records were concededly accurate and contemporaneous. P. at 5. The hours claimed for the remaining year were kept contemporaneously. A District Court familiar with the case has the expertise required to evaluate whether such hours are reasonable for the tasks undertaken. And time records, even when kept contemporaneously and in detail, are only as credible as the attorneys keeping them.

A careful reading of the District Court's analysis of the reasonableness of hours claimed,

including its discussion of duplication, deductions and travel time, P. at A 34-A 41, demonstrates that for the District Court it was not "virtually impossible to analyze the efficiency of counsel's work," as petitioners have stated. P. at 12. It is also untrue that "a substantial amount of the fees awarded were because of undocumented hours" and petitioners' statement to that effect is undocumented. P. at 12. Moreover, petitioners miscomprehend the scope of review by requesting this Court to evaluate the "substandard nature" of counsel's records "by their appearance." P. at 12. The fact that Ms. Kamp did not type each entry on her daily log of hours spent is irrelevant to their accuracy.

Petitioners seem to imply that the District Court could not recognize undocumented hours; clearly it could and did. It withheld judgment on fees to another ACLU attorney and a paralegal whose hours were not properly submitted. P. at A 42. It also postponed decision on certain hours claimed by Messrs McKenna and Miller until they submitted further affidavits clarifying how the hours were expended.

P. at A 40.

Petitioners also fail to note that the District Court reduced the hours allowed for preparation of the fee request from the 25 hours claimed by Ms. Kamp to 5 hours in order to properly reflect the hours reasonably required had all the hours been recorded contemporaneously, P. at A 42-A 43.

The District Court's discussion of duplication, P. at A 35-A 38, belies petitioners' statement that duplication of services was "disregarded" by the District Court, P. at 12. The court analyzed the reasonableness of two attorneys for the plaintiff class, the functions where both claimed hours, and the instances where awarding fees to both for the same function was appropriate. Petitioners neglect to state that the Court deducted 30% from the fees requested for those functions of these counsel that the court found specifically duplicative. P. at A 38. Petitioners also do not mention that the District Court made further deductions for travel time and made an overall deduction of 30% for the time claimed by Messrs McKenna and Miller, partly because in some instances their time was duplicative of that

of counsel for the class. P. at A 38, A 39.

As they have done previously in motions and in requests for review, petitioners once more misstate the role of other parties or persons in the case. The Department of Justice was not "granted exclusive control of discovery," P. at 4, and in a Memorandum [13] to the District Court on the issue of fees the Department clarified its role in discovery specifically in response to an identical misstatement by petitioners. Ohio State University faculty and students did not do "much of the work," P. at 6, as was testified to by Ms. Kamp in a deposition taken prior to the evidentiary hearing on fees.

The other challenges to fact finding and discretionary judgments made by petitioners and already considered and rejected by the Courts below are trivial in the context of the overall number of hours and the amount of fees awarded, and merely highlight the degree to which petitioners invite this Court to provide a de novo review of the District Court's opinion.

---

13. See footnote 3, supra.

CONCLUSION

The District Court, using accepted judicial standards based upon express legislative intent, awarded attorney's fees to the prevailing parties. These fees were commensurate with the effort and expertise which their counsel had applied to the case. Petitioners, having chosen to pugnaciously litigate the issues of the case until the moment they finally accepted a consent decree, should not be allowed to avoid the cost of adversarial litigation. The fee awards made in this case are not the proper subject for review by this Court.

Respectfully submitted,

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COUNSEL FOR RESPONDENT CLASS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Respondent Class in Opposition to Petition for Writ of Certiorari has been served via the U.S. Mail this 27th day of January, 1982 on petitioners by forwarding such copies to Allen P. Adler, Assistant Attorney General at the State Office Tower, Columbus, Ohio 43215 and upon Respondent Pearly Wilson by forwarding such copies to D. Michael Miller, 17 South High Street, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

Bruce A. Campbell
Counsel of Record
for Respondent Class

APPENDIX

FILED

JUN 22 1981

JOHN P. HEHMAN, Clerk

No. 79-3547

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD E. STEWART; ROY MARTIN; AND JAMES BOLDEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

vs.

O R D E R

JAMES A. RHODES, ET AL.,

Defendants-Appellants

BEFORE: EDWARDS, Chief Circuit Judge, WEICK and KEITH, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the appeal be dismissed on grounds of mootness.

ENTERED BY ORDER OF THE COURT

John P. Hehman

John P. Hehman, Clerk

Issued as Mandate: August 17, 1981
Costs: None

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By: Deputy Clerk

Opposition

2

81-1440

Case No. ————

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FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

JAMES A. RHODES, et al.,
Petitioners,

vs.

RONALD E. STEWART, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT, PEARLY WILSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly apply The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to affirm the decision of the United States District Court for the Southern District of Ohio, which awarded attorneys' fees under said Act to counsel for Respondent, Pearly Wilson, where the fee award was based on uncontested evidence including counsel's usual and customary billing rates and the amount of time actually expended in the litigation based on accurate and contemporaneous records, and where the District Court reduced the award by thirty percent to avoid any possible compensation for duplicated services?

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BRIEF OF RESPONDENT, PEARLY WILSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent Pearly Wilson adopts Petitioners' Statement of the Case concerning its procedural history, with the following additions and exception:

A. In February, 1978, Alvin J. McKenna and D. Michael Miller of the law firm of Alexander, Ebinger, Fisher, McAlister & Lawrence undertook representation of Respondent Pearly Wilson who had been incarcerated as an inmate at the Columbus Correctional Facility, formerly the Ohio Penitentiary.

B. Respondent Wilson requested representation by the firm of Alexander, Ebinger, Fisher, McAlister & Lawrence after being advised by the office of The Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, that it was one of the private law firms in Columbus, Ohio which had responded affirmatively to Judge Duncan's request to the bar as to the availability of counsel to represent plaintiffs in actions brought under 42 U.S.C. § 1983.

C. After the consolidation of his case with the case of *Stewart* v. *Rhodes,* Respondent Wilson was designated as a fully participating representative.

D. The Consent Decree, filed on December 4, 1979, vindicated many important rights of Respondents, including a limitation on prison population, provisions for exercise and recreation, minimum standards for medical and psychiatric care, sanitation, fire safety, and visitation, and the programmed elimination of the Columbus Correctional Facility as a facility for housing inmates. Comparison of the claims made and relief sought in Respondent Wilson's case with the relief obtained in the Consent Decree makes plain that substantially all of the issues raised by Respondent Wilson were addressed and resolved favorably to him in the Consent Decree.

E. Pursuant to a provision in the Consent Decree, counsel for Respondent Wilson submitted to the District Court an application with itemized statements of costs and hours incurred in the prosecution of the action. Petitioners have at no time challenged the allowance of fees to counsel for Respondent Wilson nor have Petitioners contested the fact that said counsel worked the hours for which a fee was requested or that the fee requested was other than said counsel's usual and customary fee.

F. The Department of Justice did not have "exclusive control of discovery" in this case as Petitioners suggest. The Department of Justice coordinated discovery efforts but counsel for each party participated in discovery consistent with their view as to the best means of utilizing each opportunity for discovery. Further, no work was done on behalf of Respondent Wilson by students or faculty of The Ohio State University College of Law.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Sixth Circuit should not be reviewed because:

A. It properly applies and is consistent with prior Sixth Circuit decisions as well as with decisions of other Courts of Appeals concerning payment of reasonable attorneys' fees to a prevailing party pursuant to The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The Sixth Circuit established no new precedent in its decision. Rather, by affirming the detailed and thorough analysis of the District Court, the Sixth Circuit merely relied on basic principles of federal law which have been previously established by the Sixth Circuit and by other Courts of Appeals regarding the factors to be considered in analyzing an award of attorneys' fees.

B. As to Respondent Wilson, Petitioners have failed to raise any substantial question of federal law regarding the attorneys' fee award made to his counsel. Neither the award itself nor the evidentiary support for that award have been challenged. For these reasons, there is a decided absence of special or important considerations which would require this Court to review the case.

ARGUMENT

A. The Decision of the Court of Appeals is Consistent With Prior Decisions of that Court and With Decisions of Other Courts of Appeals Concerning Payment of Reasonable Attorneys' Fees Pursuant to The Civil Rights Attorney's Fees Awards Act of 1976.

Contrary to Petitioner's contentions, the Sixth Circuit's decision is consistent with prior decisions of that Court, the decisions of other Courts of Appeals, and the intent of Congress in enacting The Civil Rights Attorney's Fees Awards Act of 1976. The purpose of the fee awards, as explained by Congress, is to attract competent counsel to handle suits to enforce certain civil rights acts, and to encourage compliance with the civil rights laws. S. Rep. No. 1011, 94th Cong., 2d Sess. 5-6, *reprinted in* [*1976*] *U.S. Code Cong. & Ad. News* 5908, 5913.

Congress has described the guiding principle in such cases as follows:

> In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." [Citation omitted.]
>
> *Id.*

Consistent with this Congressional mandate, the Sixth Circuit as well as other Courts of Appeals have adopted criteria to evaluate fee awards in cases covered by 42 U.S.C. § 1988. The factors to be considered in determining a reasonable attorneys' fee include the time and labor required, the customary fee, the preclusion of other employment by the attorney due to acceptance of the case, the amount involved and the results obtained, and the ex-

perience, reputation, and ability of the attorneys. *See, e.g., Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974). The Sixth Circuit has adopted this approach to determine reasonable attorneys' fee pursuant to 42 U.S.C. § 1988. *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 642-3 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

An examination of the decisions below reveals that the District Court properly applied guidelines such as set forth in *Northcross, supra*, and in cases in other Circuits such as *Johnson, supra*. Thus, the District Court issued an award of attorneys' fees only after "a careful consideration of the character of these cases, the record, memoranda of counsel, the evidence, and the *Northcross* standards . . ." [A-28 – A-29.]* In applying the *Northcross* standards, the District Court found that:

> Counsel for Wilson have provided excellent records of hourly services which appear to have been recorded contemporaneously with the performance. Moreover, defendants do not question the accuracy of the hours documented by Wilson's attorneys.
>
> [A-35.]

In addition, the District Court considered the training, background, experience and skill of Respondent Wilson's counsel. [A-41.] In as much as *Northcross* teaches that "[A] scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988," 611 F.2d at 638, and since *Johnson* requires consideration of a "customary fee," 488 F.2d at 718, the District Court conscientiously adhered to the appropriate standards in

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* Reference to the Appendix is to that appearing in Petitioners' Petition for Writ of Certiorari.

awarding fees. *See also, Anderson* v. *Morris,* 658 F.2d 246, 249 (4th Cir. 1981).

The District Court's award is also consistent with the mandate of Congress that "[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client . . ." S. Rep. No. 1011, *supra,* at 6. And, to eliminate any possibility of compensation for duplicated services, the District Court reduced the award to Respondent Wilson's counsel by thirty percent. [A-37.]

Also consistent with *Northcross* and *Johnson* and other Courts of Appeals, the District Court considered the experience, reputation and ability of counsel, the results obtained, the undesirability of the case, and the time constraints involved. [A-41 — A-45.] *See, also, Hampton* v. *Hanrahan,* 600 F.2d 600, 643 (7th Cir. 1979), *rev'd. on other grounds,* 446 U.S. 754 (1980); *Francia* v. *White,* 594 F.2d 778, 782 (10th Cir. 1979).

The District Court's award should stand as affirmed unless Petitioners can establish that the award constitutes an abuse of discretion. *See, e.g., Johnson, supra,* at 717. The Sixth Circuit, in affirming the District Court's award, found that the District Court had discussed and correctly applied the rationale of *Northcross* and had not abused its discretion in awarding the fees to Respondent Wilson's counsel. [A-3.] This determination is clearly correct under the standards discussed above. Indeed. the Courts of Appeals have repeatedly held that, in computing attorneys' fees under 42 U.S.C. § 1988, a trial judge should focus on the number of hours reasonably expended and counsel's regular hourly rate, with adjustments made based on the other factors heretofore discussed. *E.g., Anderson* v. *Morris, supra,* at 249; *Zoll* v. *Eastern Allamakee Community School Dist.,* 588 F.2d 246, 252 (8th Cir. 1978). The fee award to Respondent Wilson's counsel in this case follows pre-

cisely this directive. *See, Dennis* v. *Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980).

Petitioners have simply failed to show that the fee award to Respondent Wilson's counsel was other than a consistent application of well-established principles. Even the most searching reading of Petitioners' Argument in support of their Petition for Writ of Certiorari fails to reveal any claim that the District Court abused its discretion in calculating the fee award to Respondent Wilson's counsel. There is simply no basis on which to review the Sixth Circuit's decision and the requested writ of certiorari, therefore, should be denied.

B. Petitioners Have Failed to Raise a Substantial Question of Federal Law With Respect to the Award of Attorneys' Fees to Alexander, Ebinger, Fisher, McAlister & Lawrence.

As discussed, Petitioners have failed to show that the fee award to Respondent Wilson's counsel was inconsistent with the standards developed by the Courts of Appeals in cases of this nature. Similarly, Petitioners have not contested the correctness of a fee award to Respondent Wilson's counsel nor have Petitioners challenged the evidence supporting that award. Indeed, at page 5 of their Petition for Writ of Certiorari, Petitioners confirm the basis of the award:

> The hourly rate [of Respondent Wilson's counsel] was the usual rate paid by the firm's clients. The fee request was based on accurate and contemporaneous time records.

Neither here nor in the Courts below have Petitioners challenged the records or the hourly rates which were the

basis of the fee award to Respondent Wilson's counsel. Petitioners' arguments as to unreasonable hours, unreasonable hourly rates, fair market value of services, and duplication of services are not directed at the award made to Respondent Wilson's counsel. Thus, Petitioners have failed to raise a substantial federal question as to that award. For this reason the requested writ of certiorari should be denied as to Respondent Wilson.

CONCLUSION

The Sixth Circuit's decision in this case, affirming the District Court's award of attorneys' fees made pursuant to 42 U.S.C. § 1988, is consistent with prior decisions of the Sixth Circuit and other Courts of Appeals. The issues which Petitioners attempt to raise are neither novel nor undecided, and are critical to Petitioners only in the sense that they have been determined adversely to their interests. It is respectfully submitted that this case contains no special or important issues which would make it appropriate for review and consideration by this Court. Moreover, Petitioners fail to raise a substantial federal question with respect to the attorneys' fees award made to Respondent Wilson's counsel. For each of these reasons, the requested writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF
TO BRIEF IN OPPOSITION TO CERTIORARI

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

The question posed by the petitioners is whether an award of attorneys' fees, made pursuant to 42 U.S.C. Section 1988, should be upheld where those fees exceed the fair market value of the services provided, were awarded for an unreasonable amount of time, were unsupported by accurate records and where no deductions was made for duplication.

In opposing certiorari, the respondents' argument leaves the impression that they believe they are entitled to the inflated fee awarded because the petitioners drew out the proceedings by putting up a defense. In fact, the case was drawn out by the respondents' demand for $34,000.00 per day in damages. When the exorbitant damage demand was dropped, the case was settled. Had the damage issue been disposed of sooner, the case would have been settled sooner, the petitioners' attorneys would not have had to be quite so "adversarial", and respondent' counsel would have spent much less time litigating the case. The amount of time spent in this case was a direct result of the respondents' refusal to abandon their demand for damages and did not result from the complexity of the issues.

The Court should set firm and clear guidelines to avoid the possibility that litigation will be lengthened for the purpose of increasing the award of attorneys' fees. Any party who is reasonably certain of prevailing on one or more constitutional issues can draw out a case. The other party, who might be willing to settle, is left in the untenable position of being forced to both litigate and pay inflated awards pursuant to 42 U.S.C. Section 1988.

A court, in determining if a Section 1988 award is reasonable, should not only consider if the time spent

on the case was necessary, but should also consider if the time was spent on constitutional issues. The respondents state, at page vi of their brief:

> The complaint challenged the totality of the conditions of confinement at CCF as well as specific constitutional violations relating to "extensive inmate idleness, understaffing, inadequate religious, legal and recreational services, limited vocational and educational facilities, and poor medical care." Petition (hereafter P.) at A 31.

Only this issue of medical care is related to the constitutionality of the institution. *Bell v. Wolfish*, 441 U.S. 520, 529 n. 11 (1979). Staffing, idleness, recreation, vocational training and education are constitutionally insignificant. *Rhodes v. Chapman*, ____ U.S. ____, 69 L. Ed. 2d 59, 70 (1981). Time spent on these non-constitutional matters should not have been compensated. *Haywood v. Ball*, 634 F. 2d 740, 743 (4th Cir. 1980).

Respondents' argument that the $90.00 per hour awarded Mrs. Kamp was reasonable in light of her "extensive and specialized experience (and) knowledge" merits close examination. Mrs. Kamp's "extensive and specialized experience (and) knowledge" in prison litigation was described by her, at page 13 of the transcript of hearing, as being limited to this and two other cases. The respondents' argument is that this limited experience places Mrs. Kamp on a par with senior partners in major Columbus, Ohio law firms.

The respondents also claim that the $90.00 per hour fee allowed must be reasonable because the petitioners did not challenge the rate requested by Messrs. McKenna and Miller. The fees requested by the private practioners

were not challenged because it was their usual fee and not because the petitioners believed it was the customary fee charged in the community. See *Northcross v. Board of Education of Memphis City Schools*, 611 F. 2d 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The respondents have the burden of proving the fair market value of the services of their public interest counsel. The question raised by the petitioners is not, as suggested by respondents, one of evidence. The issue presented here involves a clear disregard by the trial court, the appellate court and the respondents for the clear intent of Congress in adopting 42 U.S.C. §1988. Congress intended that counsel for prevailing plaintiffs establish the reasonable value of the services in accordance with the decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974). The respondents did not attempt to prove the customary fee charged by lawyers of similar experiences for similar cases in Columbus, Ohio.

Respondents' claim that petitioners failed to enter into the record the results of a survey conducted by the Columbus, Ohio Bar Association is groundless for two reasons. First, it was the respondents' burden to prove the marked value of their services. Second, the survey was placed in the record by the respondents. The results of the survey were reported on January 26, 1981, six months after the district court's hearing on fees, in the Ohio State Bar Association Report, Vol. LIV No. 4. The report was cited as authority on page 4 of the respondents reply brief, filed in the court of appeals on March 13, 1981.

Certiorari should be granted and firm guidelines established for determining the reasonableness of attorneys' fee awards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief to the Brief in Opposition to Certiorari have been served on the respondent class by forwarding such copies to Ohio State Legal Services Association, 155 North High Street, Columbus, Ohio 43215, American Civil Liberties Union, Suite 150, 360 South Third Street, Columbus, Ohio 43215, Alvin J. McKenna, D. Michael Miller, Alexander, Ebinger, Fisher, McAlister and Lawrence, 17 South High Street, Columbus, Ohio 43215, and Columbus Legal Aid Society, 40 West Gay Street, Columbus, Ohio 43215, via the U.S. Mail, this day of February, 1982. I further certify that all parties required to be served have been served.

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